53D GRADUATE COURSE

POST-TRIAL PROCEDURES AND APPEALS

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53D GRADUATE COURSE

POST-TRIAL PROCEDURES AND APPEALS

"It is at the level of the convening authority that an accused has his best opportunity for relief." *United States v. Boatner*, 43 C.M.R. 216, 217 (C.M.A. 1971).

"The essence of post-trial practice is basic fair play -- notice and an opportunity to respond." *United States v. Leal*, 44 M.J. 235, 237 (1996).

"[T]he following is [the] process for resolving claims of error connected with a convening authority's post-trial review. First, an appellant must allege the error. . . . Second, an appellant must allege prejudice. . . . Third, an appellant must show what he would do to resolve the error if given such an opportunity." *United States v. Wheelus*, 49 M.J. 283, 288 (1998).

"All this court can do to ensure that the law is being followed and that military members are not being prejudiced is to send these cases back for someone TO GET THEM RIGHT." *United States v. Johnston*, 51 M.J. 227, 230 (1999).

"We have become increasingly concerned with what we view as a lack of attention to the post-trial process. For instance, the convening authority's action in this case purports to implement appellant's automatic reduction to E-1 under Article 58a, UCMJ, 10 USC §858a. This is curious since appellant was already at grade E-1 at the time of trial." *United States. v. Williams*, 57 M.J. 1, 4 n.5 (2002).

"The low standard of military justice practice and advocacy that this record demonstrates cannot be tolerated in the administration of the Uniform Code of Military Justice. At every stage of appellant's case there have been multiple failings, denying appellant justice. . . . Had the military judge, acting SJA, and appellate counsel recognized that the 'record must speak the truth,' the 'train wreck' that is the record before this court could have been avoided." *United States v. Pulido*, No. 20011043, slip op. at 5 and 7 (Army Ct. Crim. App. Mar. 19, 2004) (unpublished opinion) (quoting *United States v. Kulathungam*, 54 M.J. 386, 388 (2001)).

I. REFERENCES.

A. UCMJ, articles 55-76a.

B. Manual for Courts-Martial (2002 Edition), United States, Chapters XI, XII and Appendices 13-20.

C. Dep't of Army, Regulation 27-10, Legal Services: Military Justice, Chapter 5 (6 September 2002).

D. Francis A. Gilligan and Frederic I. Lederer, *Court-Martial Procedure*, 1999 (vol 2), Chapter 24.

E. The Clerk of Court's Handbook for Post-Trial Administration (23 August 2004).

II. GOALS OF THE PROCESS.

A. Prepare a timely record of trial adequate for appellate review.

B. Identify, correct, curtail or kill incipient appellate issues.

C. Accused's best chance for clemency.

D. Defense notice and opportunity to be heard before convening authority (CA) takes initial action on a case.

E. Help CA make informed decision when taking initial action on a case.

III. SUMMARY OF THE PROCESS.

A. Trial counsel (TC) coordinates with unit *before trial* to coordinate transportation to confinement facility.

B. Sentence is announced and the court is adjourned.

C. Trial counsel prepares report of result of trial, confinement order.

D. Request for deferment of confinement, if any.

E. Request for deferment of reduction, if any.

F. Request for deferment and/or waiver of forfeitures, if any.

G. Exhibits accounted for and reproduced.

H. Post-trial sessions, if any.

I. Record of trial (ROT) created, reproduced.

J. Trial counsel / defense counsel (DC) review ROT for errata.

K. Military judge (MJ) authenticates ROT (or substitute authentication if required).

L. Staff Judge Advocate (SJA) signs the post-trial recommendation (PTR a.k.a. SJAR).

M. PTR, authenticated ROT served on accused / DC.

N. Accused / DC submits clemency petition (R.C.M. 1105 matters) and response to PTR (R.C.M. 1106 matters). Often done simultaneously.

O. SJA signs addendum.

P. Addendum served on DC and accused if contains "new matter."

Q. CA considers DC / accused submissions, takes initial action.

R. Promulgating order signed.

S. Record reproduced and mailed.

T. Appellate review.

U. Final action.

IV. DUTIES OF COUNSEL. ARTICLE 38, UCMJ; RCM 502(d)(5)-(6), RCM 1103(b)(1).

A. Rule for Courts-Martial 502(d)(5), discussion, para. (F) addresses the trial counsel's (TC's) post-trial duties.

1. Prepare Report of Result of Trial. "[P]romptly provide written notice of the findings and sentence adjudged to the convening authority or a designee, the accused's immediate commander, and (if applicable) the officer in charge of the confinement facility."

2. Supervise preparation, authentication and distribution of the ROT. R.C.M. 1103(b)(1).

3. Review ROT for errata. *United States v. Ayers*, 54 M.J. 85 (2000). On appeal, appellant alleged that the ROT was not truly authenticated since the assistant trial counsel (ATC) was permitted to execute the authentication. The ATC signed the authentication document which stated "I have examined the

record of trial in the forgoing case." The ATC also made several corrections to the ROT. The defense claimed that in order for the authentication to be proper, the authenticating individual must state that the ROT accurately reports the proceedings. Also, defense claimed that an ATC cannot authenticate a ROT unless he is under the supervision of the TC (as required by R.C.M. 502(d)(2)). The court disagreed, holding that by signing the authentication document the ATC was stating that the ROT was correct. Also, since the defense did not allege any error in the ROT, or prejudice from having the ATC authenticate the ROT, no relief was appropriate.

4. Ensure the record of trial is served on the accused and counsel, as appropriate. R.C.M. 1104(b)(1), 1106(f)(3). *See generally*, Paragraph (F) of the Discussion to R.C.M. 502(d)(5).

B. Rule for Courts-Martial 502(d)(6), discussion, para. (E) addresses the defense counsel's (DC's) post-trial duties.

1. Advise the accused of post-trial and appellate rights (not technically post-trial – R.C.M. 1010).

2. Deferment of confinement / reduction / forfeitures. R.C.M. 1101(c).

3. Examination of the record of trial. R.C.M. 1103(b)(3)(c).

4. Submission of matters: R.C.M. 1105; 1106(f)(4), (7); and 1112(d)(2). *See also* UCMJ, art. 38(c).

5. Right to appellate review and waiver thereof, in writing, within specified time period. R.C.M. 1110.

6. Examine Staff Judge Advocate's post-trial recommendation (PTR). R.C.M. 1106(f).

7. *See also United States v. Palenius*, 2 M.J. 86, 93 (C.M.A. 1977).

a) Advice re: right to appellate review and appellate process.

b) Raising appellate issues. *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

c) Act in accused's interest. *See United States v. Martinez*, 31 M.J. 525 (A.C.M.R. 1990).

d) Maintain an attorney-client relationship. R.C.M. 1106(f)(2) (for substitute counsel); *United States v. Schreck*, 10 M.J. 226 (C.M.A. 1981); *United States v. Titsworth*, 13 M.J. 147 (C.M.A. 1982); *United States v. Jackson*, 34 M.J. 783 (A.C.M.R. 1992) (some responsibility placed on the SJA).

e) *United States v. Palenius*, 2 M.J. 86, 93 (C.M.A. 1977). "The trial defense attorney . . . should maintain the attorney-client relationship with his client subsequent to the [trial] . . . until substitute trial [defense] counsel or appellate counsel have been properly designated and have commenced the performance of their duties. . . ."

C. Effectiveness of counsel in the post-trial area is governed by *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Lewis*, 42 M.J. 1 (1995). *See also, United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994); *United States v. Brownfield*, 52 M.J. 40 (1999); and *United States v. Lee*, 52 M.J. 51 (1999). *See also* Section XXVIII *infra*.

1. *United States v. Gilley*, 56 M.J. 113 (2001). Defense counsel ineffective by submitting, as part of the accused's clemency matters, a letter from the accused's mother that "undercut [his] plea for clemency," a separate letter from the father that was "acerbic" and a "scathing diatribe directed toward trial counsel, trial defense counsel, the members, the judge, and the convening authority," and an e-mail from the accused's brother that "echoed the theme of appellant's father." *Id.* at 124. Returned for a new clemency submission, PTR, and action.

2. *United States v. Key*, 57 M.J. 246 (2002). The CAAF, without ruling, hints that defense counsel might be ineffective if counsel fails to advise the client on waiver of forfeitures and the right to request waiver. The CAAF avoids the issue in *Key* because appellant could not recall if his counsel advised him. Appellant's equivocal statement re: his recollection was insufficient to overcome the presumption that counsel's performance was competent.

V. NOTICE CONCERNING POST-TRIAL AND APPELLATE RIGHTS. RCM 1010.

A. Before adjournment of any general and special court-martial, the MJ shall ensure that the DC has informed the accused **orally and in writing** of:

1. The right to submit post-trial matters to the CA. Note – Since 1998, R.C.M. change only requires CA to consider written submissions.

2. The right to appellate review, as applicable, and the effect of waiver or withdrawal of such rights.

3. The right to apply for relief from TJAG if the case is neither reviewed by a Court of Criminal Appeals nor reviewed by TJAG under R.C.M. 1201(b)(1).

4. The right to the advice and assistance of counsel in the exercise or waiver of the foregoing rights.

B. The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and DC and inserted in the record as an appellate exhibit. Absent a post-trial 39(a) session, the written advice will usually be the last Appellate Exhibit (AE) in the record of trial.

C. The Military Judge should:

1. Examine the form submitted by the defense counsel and used to advise the client.

2. Confirm on whom the record of trial is to be served, the accused or counsel. If more than one defense counsel is on the case, determine, on the record, who is responsible for post-trial matters.

VI. REPORT OF RESULT OF TRIAL; POST-TRIAL RESTRAINT; DEFERMENT OF CONFINEMENT, FORFEITURES AND REDUCTION; WAIVER OF FORFEITURES. ARTICLES 57, 57a, 58, 58a, 58b, AND 60, UCMJ; RCM 1101.

A. Result of Trial and Post-Trial Restraint.

1. TC notifies accused's immediate commander, CA or designee, and confinement facility of results (DA Form 4430, Department of the Army

Report of Result of Trial). *See* R.C.M. 502(d)(5). *See also*, AR 27-10, para. 5-29.

2. The accused's commander may order the accused into post-trial confinement. The accused's commander may delegate to TC authority to order accused into post-trial confinement. R.C.M. 1101(b)(2). Note – Summary Court Officer (SCO) may NOT order a service member into post-trial confinement.

B. Deferment of Confinement.

1. Accused may request, in writing, deferment of confinement.

2. Accused burden to show "the interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment on its effective date [e.g., confinement]."

3. Factors CA may consider include, "where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; [and] the accused's character, mental condition, family situation, and service record." R.C.M. 1101(c)(3).

4. CA's action on deferment request MUST be in writing and a copy provided to the accused.

5. CA's written action on deferment request is subject to judicial review for abuse of discretion. The request and action thereon MUST be attached to the record of trial. R.C.M. 1103(b)(3)(D).

6. CA must specify why confinement is not deferred.

a) *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993). CA refused to defer confinement "based on seriousness of the offenses of which accused stands convicted, amount of confinement imposed by the court-martial and the attendant risk of flight, and the adverse effect which such deferment would have on good order and discipline in the command." Accused alleged abuse of discretion in refusing to defer confinement. Held – even though explanation was conclusory, it was sufficient. Court noted other matters of record supporting decision to deny deferment.

b) *Longhofer v. Hilbert*, 23 M.J. 755 (A.C.M.R. 1986).

c) *See also United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

d) *United States v. Dunlap*, 39 M.J. 1120 (A.C.M.R. 1994). Remedy for failure to state reasons for denying deferment request is petition for extraordinary relief. Court reviewed facts and determined that deferment was not appropriate.

e) *United States v. Edwards*, 39 M.J. 528 (A.F.C.M.R. 1994). Accused not entitled to relief (no reasons for denial) where deferment would have expired before appellate review. AFCMR recommends that DC ask for "statement of reasons" or petition for redress under Art. 138.

f) *United States v. Sebastian*, 55 M.J. 661 (Army Ct. Crim. App. 2001). One week prior to his trial, accused submitted a deferment request requesting that any confinement be deferred until after the upcoming Easter Holiday. He also asked for deferral and waiver of forfeitures. The CA never acted on first request. One week after trial, which included confinement as part of the adjudged sentence, the accused submitted a second request regarding forfeitures. Approximately six weeks later, five weeks after the forfeitures went into effect, the SJA responded recommending disapproval. Contrary to the SJA's advice, the CA granted the forfeitures request. "While there is no requirement for a convening authority to act 'instantaneously' on a deferment request, there is also no authority for a convening authority to fail to act at all when a deferment request is submitted in a timely manner." *Id.* at 663. The Court found prejudice both in the failure to respond to the first deferment request and in the untimely response to the second request. The Court reduced the accused's confinement from nine months to five months and set aside the adjudged forfeitures.

C. Deferment of Forfeitures.

1. Accused may request, in writing, deferment of forfeitures.

2. Accused burden to show "the interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment on its effective date [e.g., forfeitures]."

3. Applies to adjudged forfeitures (Art. 57(a)(2), UCMJ; R.C.M. 1101(c)) AND automatic forfeitures (Art. 58b(a)(1), UCMJ)). *United States v. Lundy*, 60 M.J. 52 (2004).

4. Factors CA may consider include, "where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; [and] the accused's character, mental condition, family situation, and service record." R.C.M. 1101(c)(3).

5. CA's action on deferment request MUST be in writing and a copy provided to the accused.

6. CA's written action on deferment request is subject to judicial review for abuse of discretion. The request and action thereon MUST be attached to the record of trial. R.C.M. 1103(b)(3)(D).

7. CA must specify why forfeitures are not deferred. *United States v. Zimmer*, 56 M.J. 869 (Army Ct. Crim. App. 2002). Error for the CA to deny the defense deferment request in a one-sentence action without providing reasons for the denial. Court set aside four months of confinement and the adjudged forfeitures. *See also United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

8. *United States v. Brown*, 54 M.J. 289 (2000). CA denied accused's deferment request. The SJA memorandum to CA recommending denial was never served on the accused who argued prejudice because he was not afforded the opportunity to rebut the memorandum. The CAAF found no prejudice, however, they strongly suggested that new rules be created regarding deferment and waiver requests – rules could require an SJA recommendation with deferment and waiver requests with a corresponding notice and opportunity to respond provision.

9. *United States v. Key*, 55 M.J. 537 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 246 (2002). Nine days after being sentenced, the accused submitted a request asking for deferment of forfeitures and reduction in grade. The SJA's written response recommended disapproval, advice the CA followed. The SJA's advice was never served on the accused. He argued prejudice claiming deferment requests should be processed like a clemency request. Although the Air Force requires that waiver requests be treated like clemency requests (*United States v. Spears*, 48 M.J. 768 (A.F. Ct. Crim. App. 1998) (overruled in part on other grounds)) subject to the requirements of Article 60, deferment of

forfeitures and reductions in rank do not have to be treated similarly. No requirement that an SJA recommendation regarding deferment be served on defense. Note – the CAAF affirmed without reaching the issue of whether service of the SJA's memo is a per se requirement. They noted the absence of "new matter" and the non-inflammatory nature of the SJA's memo in affirming.

D. Waiver of Forfeitures.

1. Accused may request waiver of automatic forfeitures (Art. 58b, UCMJ) or the CA may waive, sua sponte. The accused's request should be in writing.

2. Waiver is allowed for a period not to exceed six months and is for the purpose of providing support to the accused's dependents, as defined in 37 U.S.C. § 401.

3. Factors CA may consider include: "the length of the accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059." R.C.M. 1101(d)(2).

4. CA's action on waiver request MUST be in writing and a copy provided to the accused.

5. CA's written action on waiver request is subject to judicial review for abuse of discretion. The request and action thereon MUST be attached to the record of trial. R.C.M. 1103(b)(3)(I).

6. Waiver of forfeitures is authorized as soon as they become effective. Need not wait until action.

7. *United States v. Nicholson*, 55 M.J. 551 (Army Ct. Crim. App. 2001). SJA advice stating that waiver request prior to action is premature and must be submitted as part of the R.C.M. 1105 submissions is incorrect. The convening authority may waive and direct payment of any automatic forfeitures when they become effective by operation of Article 57(a). Automatic forfeitures go into effect fourteen days after the sentence is announced. *See also United States v. Kolodjay*, 53 M.J.732 (Army Ct. Crim. App. 2000). Within two weeks of his conviction, accused submitted a request for deferment and waiver of forfeitures. The SJA did not bring the request to the CA until five months later, at action. The CA approved the deferment retroactively (the court discussed but did not rule on whether this was

appropriate or not), and granted waiver for six months beginning on the date the sentence was adjudged. The CA's action, however, was ambiguous and contradictory. Returned for clarification.

E. Deferment of Reduction in Rank. Processed like a request for deferment of confinement or forfeitures. *See* VIB and VIC *supra*.

VII. POST-TRIAL SESSIONS. ARTICLE 39, UCMJ; RCM 905, 1102.

A. Types of post-trial sessions:

1. Proceedings in revision. "[T]o correct an apparent error, omission, or improper or inconsistent action by the court-martial which can be rectified by reopening the proceeding without material prejudice to the accused." R.C.M 1102(b)(1); and

2. Art. 39(a) sessions. "[To inquire] into, and, when appropriate, [resolve] any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence. The military judge may also call an Article 39(a) session, upon motion of either party or sua sponte, to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence." R.C.M. 1102(b)(2). "The military judge shall take such action as may be appropriate**,** including appropriate instructions when members are present. The members may deliberate in closed session, if necessary, to determine what corrective action, if any, to take." R.C.M. 1102(e)(2); *United States v. Jackson*, 34 M.J. 1145 (A.C.M.R. 1992).

B. Timing.

1. The MJ may call a post-trial session before the record is authenticated. The CA may direct a post-trial session any time before taking initial action or at such later time as the convening authority is authorized to do so by a reviewing authority, except that no proceeding in revision may be held when any part of the sentence has been ordered executed. R.C.M. 1102(d).

2. *United States v. Scaff*, 29 M.J. 60, 65 (C.M.A. 1989) (until MJ authenticates the ROT, MJ may conduct a post-trial session to consider newly discovered evidence, and in proper cases may set aside findings of guilty and the sentence).

3. MJ need not wait for guidance or directive from reviewing authority or CA. "The military judge may also call an Article 39(a) session, upon motion of either party or sua sponte, to reconsider any trial ruling that substantially

affects the legal sufficiency of any findings of guilty or the sentence." R.C.M. 1102(b)(2).

C. Format. Rule essentially adopts the *DuBay* "hearing" concept but it expands the jurisdiction of the MJ into post-trial proceedings. Article 39(a) requires that "these proceedings shall be conducted in the presence of the accused." *See also United States v. Caruth*, 6 M.J. 184 (C.M.A. 1979) (post-action hearing held in accused's absence found "improper and . . . not a part of the record of trial").

D. Limitations. R.C.M. 1102(c). *See United States v. Boland*, 22 M.J. 886 (A.C.M.R. 1986), *pet. denied*, 23 M.J. 400 (C.M.A. 1987). Post-trial sessions cannot:

1. Reconsider a finding of not guilty as to a specification, or a ruling which amounts to a finding of not guilty.

2. Reconsider a finding of not guilty as to a charge unless a finding of guilty to some other Article is supported by a finding as to a specification.

3. Increase the severity of a sentence unless the sentence is mandatory.

E. Cases.

1. *United States v. Humpherys*, 57 M.J. 83 (2002). Post-trial 39(a) session held by MJ to question two panel members about a rater-ratee relationship which they failed to disclose during voir dire. After making extensive findings of facts and conclusions of law, the MJ indicated he would not have granted a challenge for cause based on the relationship had it been disclosed. Petition for a new trial denied. CAAF noted the following regarding the MJ's post-trial responsibilities:

> The post-trial process empowers the military judge to investigate and resolve allegations, such as those in this case, by interviewing the challenged panel members. It allows the judge to accomplish this task while the details of trial are still fresh in the minds of all participants. The judge is able to assess firsthand the demeanor of the panel members as they respond to questioning from the bench and counsel.

Id. at 96.

2. *United States v. Jones*, 46 M.J. 815 (N-M. Ct. Crim. App. 1997). In mixed plea case, MJ failed to announce findings of guilty of offenses to which

accused had pled guilty, and as to which MJ had conducted providence inquiry. Upon realizing failure to enter findings, MJ convened post-trial 39(a) hearing and entered findings consistent with pleas of accused. Though technical violation of R.C.M. 922(a) occurred, MJ commended for using post-trial session to remedy oversight.

3. *United States v. Perkins*, 56 M.J. 825 (Army Ct. Crim. App. 2002). MJ's failure to properly announce guilty finding as to Spec 3 of Charge II (MJ Announced Guilty to Spec 3 of Charge III) did not require Court to set aside appellant's conviction of Specification 3 of Charge II when it was apparent from the record that the MJ merely misspoke and appellant had actually plead guilty to Specification 3 of Charge II. Court notes that a proceeding in revision UP of R.C.M. 1102 would have been an appropriate course of action had the MJ or SJA caught the mistake.

4. *United States v. Kulathungam*, 54 M.J. 386 (2001). Proceeding in revision to correct erroneous omission of findings from the record and to formally announce findings appropriate. Omission was the only procedural deviation by the MJ during the court. Note – upon discovery of the omission, the TC and Court Reporter "inserted" the findings in the record. DC was aware of the omission during trial but for tactical reasons chose to remain silent. On appeal, the CAAF advised counsel, in the future, to seek the advice of the MJ or a more senior counsel to avoid the "train wreck" that occurred in that case.

5. *United States v. Mayfield*, 45 M.J. 176 (1996). Accused's written judge alone (JA) request never signed by parties and made part of the record. Additionally, no timely oral request for judge alone was made on the record. Before authentication, MJ realized omission and called proceeding in revision, at which accused acknowledged he had made request in writing and that JA trial had been his intent all along. Note – shows that it does not matter how the post-trial proceeding is labeled, as he called it a post-trial 39(a) session, though the court characterizes it as a proceeding in revision. CAAF reverses the Navy Court, which had found the failure to formally request JA to be a jurisdictional error.

6. *United States v. Avery*, Army 9500062 (17 May 1996)(unpub.). Post-trial 39(a) session held to inquire into allegations that a sergeant major (SGM) slept through part of the trial. Testimony of MAJ H, panel president, about "SGM A's participation during deliberations . . . was relevant and admissible." MJ "properly stopped appellant's trial defense counsel from asking MAJ H about any opinions expressed by SGM A during deliberations."

7. *United States v. Gleason*, 43 M.J. 69 (1995). Proceeding in revision is inappropriate to correct erroneous sentencing instruction. Proper procedure is a rehearing. UCMJ, art. 63 prohibits members who sat in original proceeding

from sitting on a rehearing. No such prohibition exists for a proceeding in revision. There is no problem in having the same members for a proceeding in revision. *See also United States v. Roman*, 22 U.S.C.M.A. 78, 81, 46 C.M.R 78, 81 (1972).

8. *United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985). Post-trial 39(a) appropriate procedure to repeat proceedings to reconstruct portions of a record of trial resulting from loss of recordings.

9. *United States v. Jordan*, 32 M.J. 672 (A.F.C.M.R. 1991). MJ erred in entering findings of guilty on two specifications. After authentication he noticed error and notified SJA, who advised CA to only approve proper findings, but to approve sentence as adjudged. "If the error were detected before authentication, the better method of handling this type of error would have been for the military judge to direct a post-trial session under R.C.M. 1102(d)." Such a post-trial session could have been used to reconsider the erroneous findings of guilty and re-determine the sentence. *See* R.C.M. 1102(b), (c), and (e). As requested by the trial defense counsel, the convening authority could have also ordered a rehearing on sentence and avoided this issue. *See* R.C.M. 1107(e)(1)." *Id.* at 673-4, n.1.

10. *United States v. Wallace*, 28 M.J. 640 (A.F.C.M.R. 1989). MJ became aware of possible extraneous information received by the panel on the "ease of converting a BCD to a general discharge." MJ had an obligation to sua sponte convene a post-trial 39(a) session to assess facts and determine any possible prejudice. Findings affirmed; sentence set aside and rehearing authorized.

11. *United States v. Wilson*, 27 M.J. 555 (C.M.A. 1988). TC failed to administer oath to two enlisted panel members. MJ held a proceeding in revision to correct the "substantial omission, to wit: a sentence and a sentencing proceeding." Ministerial act of swearing court members is essential to legal efficacy of proceedings but not a matter affecting jurisdiction.

12. *United States v. Baker*, 32 M.J. 290 (C.M.A. 1991). MJ held a post-trial 39(a) session to correct the omission in sentence announcement (the president of the panel failed to announce the adjudged DD). Held – Error; presents the appearance of UCI. *See also United States v. Dodd*, 46 M.J. 864 (Army Ct. Crim. App. 1997) (error for court to re-convene two minutes after adjourned to state they had also adjudged a bad-conduct discharge).

13. *United States v. Jones*, 34 M.J. 270 (C.M.A. 1992). MJ held proceeding in revision two months after adjournment to correct "erroneous announcement of sentence" (failure to announce confinement). Held - Error. "Article

69(e)(2)(c) disallows such corrective action, to assure the integrity of the military justice system." *Id.* at 271.

14. *United States v. Jackson*, 34 M.J. 1145 (A.C.M.R. 1992). MJ held post-trial 39(a) session one month after adjournment, declared mistrial as to sentence based on procedural error (court members used improper voting procedures), and ordered new session with same members. Held – post-trial session was actually a proceeding in revision and, since the error was substantive, was inappropriate; even if not error, inappropriate to use same sentencing authority. *See also United States v. Roman*, 22 U.S.C.M.A. 78, 81, 46 C.M.R 78, 81 (1972).

15. *United States v. Miller*, 47 M.J. 352 (1997). MJ abused his discretion when he denied the accused's request for delay of a post-trial 39(a) session in order to obtain civilian defense counsel. MJ was more concerned with expediency and convenience to government than protecting rights of the accused.

16. *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984). Unlawful command control for president to order a re-vote after a finding of not guilty had been reached. MJ should build a factual record at a post-trial 39(a) session.

17. *United States v. Steck*, 10 M.J. 412 (C.M.A. 1981). Proceeding in revision, directed by CA, appropriate to conduct a more thorough inquiry into the terms of the pretrial agreement and accused's understanding thereof.

18. *United States v.* LePage, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). Military judge erroneously admitted NJP action (PE 3) and considered evidence in arriving at a punitive discharge. At a post-trial 39(a) session, the MJ held that he erred and that the error prejudiced appellant. He further held, erroneously, that he lacked authority to correct the defect, citing to R.C.M. 1009 addressing reconsideration of sentences. Held – the military judge could have corrected the error under R.C.M. 1102 at a post-trial 39(a) session since the erroneous admission of the evidence "substantially affect[ed] the sufficiency of the sentence."

19. MJ may, any time until authentication, "reconsider any ruling other than one amounting to a finding of not guilty." R.C.M. 905(f).

VIII. PREPARATION OF RECORD OF TRIAL. ARTICLE 54, UCMJ; RCM 1103; MCM, APPENDIX 13 AND 14.

A. Requires every court-martial to keep a record of proceedings.

B. *In a GCM*, TC shall, under the direction of the MJ, cause the ROT to be prepared and the reporters' notes, however compiled, to be retained. The ROT must be verbatim if:

1. Any part of the sentence exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month, any forfeiture of pay for more than six months, or other punishments which may be adjudged by a SPCM.

2. A BCD has been adjudged.

3. *United States v. Madigan*, 54 M.J. 518 (N.M. Ct. Crim. App. 2000). Appellant asserted (among other allegations of error) that the ROT was incomplete because the Article 32 investigation was not included and the Article 34 SJA advice was also missing. Both allegations were without merit. The appellant waived his allegation of error regarding the Article 34 advice because no objection had been made, before, during or after trial. Also, the appellant alleged no prejudice from this error. The Article 32 was missing because the appellant had pled guilty and waived the Article 32 investigation.

C. Rule for Courts-Martial 1103 and the discussion list what must be included in or attached to the ROT. The rule is supplemented by AR 27-10, Chpt. 5, Sec. V, JAGMAN Sec. 0120, and AF Reg 111-1, para. 15-8.

D. For a special court-martial, the transcript is verbatim if a BCD is adjudged, confinement is greater than six months, or forfeiture for more than six months.

E. Summary court-martial records are governed by R.C.M. 1305. *See* Appendix 15, MCM and DD Form 2329.

F. Acquittals: Still need a ROT (summarized).

G. If 39(a) session called – court is called into session – a ROT is required. *See* R.C.M. 1103(e). For example, accused is arraigned and subsequent to arraignment, charges are withdrawn and dismissed – prepare a summarized ROT.

H. What if a verbatim ROT cannot be prepared? *See* R.C.M. 1103(f). *But see United States v. Crowell, supra* (can reconstruct the record of trial to make it "verbatim").

I. How verbatim is verbatim? No substantial omissions.

1. Verbatim does not mean word-for-word. *See United States v. Gray*, 7 M.J. 296 (C.M.A. 1979); *United States v. Behling*, 37 M.J. 637 (A.C.M.R.

1993). Insubstantial omissions do not make a record non-verbatim, but substantial omissions create a rebuttable presumption of prejudice that the Government must rebut. *United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981).

2. The Government can reconstruct the record of trial to rebut the presumption of prejudice. *United States v. Lashley,* 14 M.J. 7 (C.M.A. 1982); *United States v. Eichenlaub*, 11 M.J. 239 (C.M.A. 1981); *United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985).

3. *United States v. Cundini*, 36 M.J. 572 (A.C.M.R. 1992). Failure to attach copy of charges and specifications as appellate exhibit not substantial omission; where omission is insubstantial, accused must show specific prejudice.

4. *United States v. Washington*, 35 M.J. 774 (A.C.M.R. 1992). Pretrial conferences under R.C.M. 802 need not be recorded; matters agreed upon, however, must be made a part of the record.

5. *United States v. Marsh*, 35 M.J. 505 (A.F.C.M.R. 1992). Off-the-record discussion of administrative discharge not a substantial omission where issue had been raised on the record and military judge ruled on the record that trial would proceed.

6. *United States v. Clemons*, 35 M.J. 767 (A.C.M.R. 1992). ROT qualified as verbatim record although it included three off-the-record pauses; session involved purely administrative matters, what took place was not essential substance of trial, and sessions were not recorded for legitimate purposes.

7. *United States v. Kyle*, 32 M.J. 724 (A.F.C.M.R. 1991). After reviewing documents *in camera*, MJ must seal the documents and attach them to the ROT. *See* R.C.M. 702(g)(2) and Art. 54(c)(1). "A military judge must make a record of every significant *in camera* activity (other than his legal research) adequate to assure that his decisions are reviewable on appeal." *Id.* at 726.

8. *United States v. Harmon*, 29 M.J. 732 (A.F.C.M.R. 1989). Tape recorder fails. MJ attempts to reconstruct. Because of substantial omission, burden on government to rebut presumption of prejudice. In this case, an almost impossible task.

9. *United States v. Sneed*, 32 M.J. 537 (A.F.C.M.R. 1990). DC argues *ex parte* motion telephonically to MJ. Defense complains that record is not verbatim because the *ex parte* telephone conversation was not recorded and was not made a part of the required verbatim ROT. Held – "although the

omission may have sufficient 'quantitative' substance to raise the presumption of prejudice . . . we have no hesitancy in finding that presumption effectively rebutted, not so much by affirmative government action (*e.g.*, reconstruction of the record) as by the totality of circumstances." *Id.* at 540 (citation omitted).

10. *United States v. Alston*, 30 M.J. 969 (N.M.C.M.R. 1990). Omission of testimony relating to offenses of which accused was acquitted equals substantial omission.

11. *United States v. Chollet*, 30 M.J. 1079 (C.G.C.M.R. 1990). Several bench conferences have "inaudible" sections. "We believe that these inaudible portions were substantial omissions which, along with other non-transcriptions, render the record non-verbatim." Court does not approve the BCD.

12. *United States v. Seal*, 38 M.J. 659 (A.C.M.R. 1993). Omission of videotape viewed by MJ before imposing sentence renders ROT "incomplete," resulting in reversal.

13. *United States v. Maxwell*, 2 M.J. 1155 (N.M.C.M.R. 1975). Two audiotapes inadvertently destroyed, resulting in loss of counsel's arguments, a brief Art. 39(a) session on instructions and announcement of findings. All but DC argument reconstructed. "We do not view the absence of defense counsel's argument as a substantial omission to raise the presumption of prejudice. . . [and] no prejudice has been asserted." *Id.* at 1156.

14. *United States v. Sylvester,* 47 M.J. 390 (1998). ROT does not contain R.C.M. 1105 / 1106 submissions from CDC and request for deferment or the CA's action thereon. Held – No error for failing to include the R.C.M. 1105 / 1106 submissions (CDC did not submit written matters, but made an oral presentation to the CA). CAAF refused to create a requirement that all such discussions be recorded or memorialized in the ROT, but made it clear they prefer written post-trial submissions. CAAF did find error, although harmless, for not including the deferment request and action in the ROT (the accused was released six days after the request).

15. *United States v. Taite*, No.9601736 (Army Ct. Crim. App., Nov. 14, 1997). ROT originally missing three defense exhibits (photo of post office (crime scene), and 2 stipulations of expected testimony not transcribed). Government re-created the stipulations, but could not replicate the photo. Held – non-verbatim ROT. If missing exhibit cannot be re-created, a description may be substituted pursuant to a certificate of correction (R.C.M. 1103(b)(2)(D)(v); R.C.M. 1104(d)). In the meantime, action set aside to

prepare substantially verbatim ROT for CA. If cannot do so, can only approve SPCM punishment.

16. *United States v. Simmons*, 54 M.J. 883 (N-M. Ct. Crim. App. 2001). During appellant's trial, there were two gaps in which the government had technical difficulty with its recording devices. An Article 39(a) session had to be reconstructed due to a tape malfunction and approximately 50 minutes of testimony were lost due to the volume being too low. Article 54(a) requires the preparation of a complete ROT in a general court-martial where the accused received a discharge. A complete ROT should include a verbatim transcript. If the government cannot provide a verbatim ROT they can either establish the accused suffered no prejudice or only approve the sentence that could be adjudged if the accused had been tried by a straight special court-martial. The court did a line-by-line analysis of the portions of the ROT that were missing and concluded that no prejudice occurred. The Court agreed that the ROT was not verbatim, but the government had overcome the presumption of prejudice applied by the court.

17. *United States v. Henthorn, Jr.*, 58 M.J. 556 (N-M. Ct. Crim. App. 2003). Record of trial (ROT) which omitted approximately 24 pornographic images considered by the MJ on sentencing results in a deficient ROT and presumed prejudice to the appellant; however, said prejudice is rebuttable. Held – "such presumed prejudice [was] adequately rebutted" and any error stemming from the omission was harmless beyond a reasonable doubt. *Id.* at 559. Factors considered by the court: the case was a GP; the omitted evidence did not go to guilt or innocence; the appellant did not question the validity of his plea; the images were adequately described in the ROT; the defense counsel was aware of the MJ's proposed handling of the images (i.e., ordered sealed in NCIS case file); and neither defense counsel or appellate defense counsel questioned the nature of the omitted documents

J. Additional TC duties.

1. Correct number of copies of ROT specified.

2. Security classification of ROT.

3. Errata. Examine the ROT before authentication and make corrections. R.C.M. 1103(i)(1)(A).

K. Unless unreasonable delay will result, DC will be given an opportunity to examine the ROT before authentication. R.C.M. 1103(i)(1)(B). *United States v. Bryant*, 37 M.J. 668 (A.C.M.R. 1993). Review by DC before authentication is preferred, but will not result in return of record for new authentication absent showing

of prejudice. *See also United States v. Smith*, 56 M.J. 711 (A.F. Ct. Crim. App. 2001).

L. Videotaped ROT procedures. Authorized in exceptional circumstances by the Rules for Courts-Martial. Not authorized in AR 27-10.

M. Military Judges Duties / Responsibilities. *United States v. Chisholm*, 58 M.J. 733 (Army Ct. Crim. App. 2003), *aff'd*, 59 M.J. 151 (2003) (lower court's decision was not "advisory" in nature; issue of whether a Trial Judge has the authority noted by the lower court not reached by the court). Both Article 38(a), UCMJ, and R.C.M. 1103(b)(1)(A) make the military judge responsible for overseeing and ensuring that the record of trial is prepared. The court, after noting that preparation of the record of trial is a "shared responsibility" between the SJA and military judge, found that military judges "have both a duty and responsibility to take active roles in 'directing' the timely and accurate completion of court-martial proceedings." 58 M.J. at 737. The court highlighted a military judge's "inherent authority to issue such reasonable orders as may be necessary to enforce that legal duty," noting that the manner in which he or she directs completion of the record is a matter within his or her "broad discretion." Having said that, the court suggested several "remedial actions" available to a military judge:

> The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused's release from confinement until the record of trial is completed and authenticated; or (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing.

Id. at 737-38. Jurisdictions that choose to ignore a military judge's order regarding preparation of the record of trial "do so at their peril." *Id*. Note: Although the CAAF found that the lower court decision was NOT advisory, the CAAF also noted that "the parties in a subsequent case are free to argue that specific aspects of an opinion . . . should be treated as non-binding dicta." 59 M.J. 151, 152 (2003).

IX. RECORDS OF TRIAL; AUTHENTICATION; SERVICE; LOSS; CORRECTION; FORWARDING. ARTICLE 54, UCMJ; RCM 1104.

A. Authentication by MJ or judges in GCM or SPCM with adjudged BCD. Authentication IAW service regulations for SPCM (same as GCM in AR 27-10). Substitute authentication rules provided (*Cruz-Rijos* standard).

1. Dead, disabled or absent: only exceptions to MJ authentication requirement. Art. 54(a). *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976).

2. TC may authenticate the ROT only if the military judge is genuinely unavailable for a lengthy period of time.

a) PCS to distant place may qualify as absence. *United States v. Lott*, 9 M.J. 70 (C.M.A. 1980). Reduced precedential value in light of spread of technology (facsimiles, overnight delivery, etc.). Also justification for substitute authentication is less given the demise of the 90-day post-trial/confinement *Dunlap* rule (*see United States v. Banks,* 7 M.J. 92 (C.M.A. 1979)).

b) An extended leave may be sufficient. *United States v. Walker*, 20 M.J. 971 (N.M.C.M.R. 1985) (leave of 30 days is prolonged absence). *But see United States v. Batiste*, 35 M.J. 742 (A.C.M.R. 1992) (15 day leave does not equal prolonged absence); R.C.M. 1104(a)(2)(B), Discussion (substitute authentication only for emergencies; the brief, temporary absence of the MJ is not enough).

c) Military judge's release from active duty authorizes substitute authentication UP of R.C.M. 1104(a)(2)(B). *See United States v. Gibson*, 50 M.J. 575, 576 (N-M. Ct. Crim. App. 1999); *United States v. Garman*, 59 M.J. 677, 680 (Army Ct. Crim. App. 2003).

d) A statement of the reasons for substitute authentication should be included in the ROT. *United States v. Lott*, 9 M.J. 70 (C.M.A. 1980).

e) Query: OCONUS judges on CONUS leave, TDY?

B. If more than one MJ, each must authenticate his portion. *United States v. Martinez*, 27 M.J. 730 (A.C.M.R. 1988).

C. TC shall cause a copy of ROT to be served on the accused after authentication. Substitute service rules provided. R.C.M. 1104(b).

1. UCMJ, art. 54(c) requires such service as soon as the ROT is authenticated.

2. In *Cruz-Rijos, supra*, the CMA added the requirement that this be done well before CA takes action.

3. Substitute service on the DC is a permissible alternative. *See United States v. Derksen*, 24 M.J. 818 (A.C.M.R. 1987).

D. What to do if the authenticated ROT is lost? Produce a new ROT for authentication. *United States v. Garcia*, 37 M.J. 621 (A.C.M.R. 1993) (SJA prepared certification that all allied documents were true copies of originals – sufficient substitute for original documents).

E. Rules for correcting an authenticated ROT. Certificate of correction process. Correction to make the ROT conform to the actual proceedings. R.C.M. 1104(d).

F. The authenticated ROT will be forwarded to the CA for action or referred to the SJA for a recommendation before such action. SJA recommendation required prior to taking action in a GCM or SPCM in which a punitive discharge or confinement for one year was adjudged. R.C.M. 1106(a).

G. If defense time for errata is unreasonable, MJ can authenticate without errata. R.C.M. 1103(i)(1)(B).

X. MATTERS SUBMITTED BY THE ACCUSED. ARTICLE 60, UCMJ; RCM 1105.

"[W]hile the case is at the convening authority . . . the accused stands the greatest chance of being relieved from the consequences of a harsh finding or a severe sentence." United States v. Dorsey, 30 M.J. 1156 (A.C.M.R. 1990), quoting *United States v. Wilson*, 26 C.M.R. 3, 6 (C.M.A. 1958).

A. After being sentenced, the accused has the right to submit matters for the CA's consideration.

1. *See United States v. Davis*, 20 M.J. 1015 (A.C.M.R. 1985) (DC's failure to submit matters under R.C.M. 1105 and failure to mention under R.C.M. 1106(f) that MJ strongly recommended suspension of the BCD amounted to ineffective assistance). *See* R.C.M. 1106(d)(3)(B) that now requires the SJA to bring to the CA's attention recommendations for clemency made on the record by the sentencing authority. *See also United States v. Gilley*, 56 M.J. 113 (2001) (DC's submission of three enclosures which reduced the accused's chances for clemency was ineffective).

2. *United States v. Harris*, 30 M.J. 580 (A.C.M.R. 1990). DC is responsible for determining and gathering appropriate post-trial defense submissions.

3. *United States v. Martinez*, 31 M.J. 524 (A.C.M.R. 1990). DC sent the accused one proposed R.C.M. 1105 submission. When the defense counsel received no response (accused alleged he never received it), DC submitted nothing; ineffective assistance found.

4. *United States v. Tyson*, 44 M.J. 588 (N-M. Ct. Crim. App. 1996). Substitute counsel, appointed during 15-month lapse between end of the SPCM and service of the PTR, failed to generate any post-trial matters (in part because accused failed to keep defense informed of his address). No government error, but action set aside because of possible IAC.

5. *United States v. Sylvester*, 47 M.J. 390 (1998) (while oral submissions to CA by CDC not improper, CAAF expressed a preference for written submissions, at least to document the oral presentation).

B. Accused can submit anything, but the CA need only consider written submissions. *See* R.C.M. 1105.

1. The material may be anything that may reasonably tend to affect the CA's action, including legal issues, excluded evidence, previously unavailable mitigation evidence, and clemency recommendations. *See United States v. Davis*, 33 M.J. 13 (C.M.A. 1991).

2. Query: How much must he "consider" it? Read it entirely? Trust SJA's (realistically COJ's or TC's) summary? As DC's, what are your options here? DC should provide a complete summary of the accused's R.C.M. 1105 matters – highlight for the CA the key documents/submissions.

C. Time periods.

1. GCM or SPCM—due on later of 10 days after service of PTR on BOTH DC and the accused and service of ROT on the accused.

2. SCM—within 7 days of sentencing.

3. The failure to provide these time periods is error; however, the accused must make some showing that he would have submitted matters. *United States v. DeGrocco*, 23 M.J. 146 (C.M.A. 1986). *See also United States v. Sosebee*, 35 M.J. 892 (A.C.M.R. 1992). "A staff judge advocate who discourages submissions to the convening authority after the thirty-day time limit but prior to action creates needless litigation and risks a remand from this Court." *Id.* at 894.

D. Waiver rules. The accused may waive the right to make a submission under R.C.M. 1105 by:

1. Failing to make a timely submission.

a) *United States v. Maners*, 37 M.J. 966 (A.C.M.R. 1993). CA not required to consider late submission, but may do so with view toward recalling and modifying earlier action.

b) *But see United States v. Carmack*, 37 M.J. 765 (A.C.M.R. 1993). Government "stuck and left holding the bag" when defense makes weak or tardy submission, even though no error or haste on part of the government.

c) *United States v.* Doughman, 57 M.J. 653 (N-M. Ct. Crim. App. 2002), *pet. denied*, 58 M.J. 184 (2003). Failure to submit matters in a timely manner (i.e., 10 days UP of Article 60, UCMJ and R.C.M. 1105 or 10 plus 20 if extension granted) constitutes a waiver of the right to submit matters.

> Article 60, UCMJ, 10 U.S.C. § 860, affords an accused the right to submit matters for the convening authority's consideration, prior to the convening authority taking action on the case. . . . With this statutory right . . . also comes a responsibility: to submit matters in a timely fashion. Both Article 60, UCMJ, and R.C.M. 1105 clearly require that matters in clemency be submitted within 10 days of the service of the record of trial or the staff judge advocate's recommendation (SJAR), whichever is later, unless an extension is sought or granted.

Id. at 654. Held – absent evidence of an approved extension, the appellant waived the right to submit matters. Despite finding waiver, a review of the record revealed no prejudice since the appellant's submissions were in the proper place in the record and the action post-dated the appellant's submission. Citing to *United States v. Stephens*, 56 M.J. 391 (2002), the court noted that nothing requires the CA to list everything considered prior to taking action; in the absence of evidence to the contrary, the presumption is that the CA considered clemency matters submitted by the appellant prior to taking action.

2. By making a partial submission without expressly reserving in writing the right to submit additional matters. *United States v. Scott*, 39 M.J. 769 (A.C.M.R. 1994).

3. Filing an express, written waiver.

4. Being AWOL so that service of the ROT on the accused is impossible and no counsel is qualified or available under R.C.M. 1106(f)(2) for service of the ROT. This circumstance only waives the right of submission during the ten day period after service of the ROT.

E. Submission of matters contrary to client's directive. *United States v. Williams*, 57 M.J. 581 (N-M. Ct. Crim. App. 2002). Error for the defense counsel to submit a Memorandum for Record (MFR) which documented his advice to his client and his client's decision not to submit clemency matters, however, the appellant suffered no harm as a result of the error. *See also United States v. Blunk*, 17 U.S.C.M.A. 158, 37 C.M.R. 422 (1967).

F. Claims of post-trial cruel and unusual punishment.

1. *United States v. Roth*, 57 M.J. 740 (Army Ct. Crim. App. 2002), *aff'd*, 58 M.J. 239 (2003) (summary disposition). Claims of post-trial cruel and unusual punishment in violation of the Eight Amendment or Article 55, UCMJ are within a CCA's Article 66, UCMJ, review authority. In order to succeed on his claim of injury to his testicle while at the DB, injury resulting from improper frisks without "penological justification," the appellant must satisfy both an objective and subjective test regarding the alleged injury. Objectively, the appellant must show that the "alleged deprivation or injury was 'sufficiently serious' to warrant relief." *Id.* at 742. Secondly, the appellant must show that the person causing the injury had a "culpable state of mind and subjectively intended to maliciously or sadistically harm [him] through the use of wanton or unnecessary force, and that the injury was not caused by a good faith effort to maintain or restore discipline." *Id.* Held – although appellant satisfied the objective test, he failed to present any subjective evidence of culpability or use of wanton or unnecessary force.

2. *United States v. Brennan*, 58 M.J. 351 (2003). The test for post-trial claims of cruel and unusual punishment is two pronged with an objective component and subjective component: "whether there is a sufficiently serious act or omission that has produced a denial of necessities . . . [and] whether the state of mind of the prison official demonstrates deliberate indifference to inmate health or safety," respectively. *Id.* at 353. Additionally, "to sustain an Eighth Amendment violation, there must be a showing that the misconduct by prison officials produced injury accompanied by physical or psychological pain." *Id.* at 354. During the post-trial processing of the appellant's case, the appellant's counsel requested clemency based on seven separate grounds, one of which was an allegation that while confined at the USACFE, Mannheim, Germany, she was subjected to cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ (i.e., sexual harassment and

assaults by an E-6 cadre member over a two-month period). In responding to the allegations, the Government argued that the appellant failed to establish harm and additionally, relief was not warranted because the Convening Authority (CA) already granted clemency. The court disagreed with both assertions. First, the court found that it was clear that the appellant suffered harm at the hands of the cadre member. Next, although the CA granted some clemency (reducing confinement by three months), the CA's action was unclear as to why he granted the clemency. The appellant's counsel raised seven separate bases for relief and the SJAR was silent regarding the allegation of cruel and unusual punishment. Held – the decision of the service court was affirmed as to findings and set aside as to sentence. The case was remanded to the service court with the option of either granting relief at their level for the Article 55, UCMJ, violation (i.e., Eighth Amendment) or to remand back to the CA for remedial action.

G. Appellate counsel access to defense files. *United States v. Dorman*, 58 M.J. 295 (2003). Error for military defense counsel and the CCA to deny civilian defense counsel access to the appellant's case file after civilian defense counsel obtained a signed release from the client. "[T]rial defense counsel must, upon request, supply appellate defense counsel with the case file, but only after receiving the client's written release." *Id.* at 298.

XI. RECOMMENDATION OF THE SJA OR LEGAL OFFICER AND DC SUBMISSION. ARTICLE 60, UCMJ; RCM 1106.

A. R.C.M. 1106 requires a written SJA recommendation before the CA takes action on a GCM with any findings of guilty or a SPCM with an adjudged BCD or confinement for a year.

B. Disqualification of persons who have previously participated in the case.

1. Who is disqualified? The accuser, IO, court members, MJ, any TC, DC, or anyone who "has otherwise acted on behalf of the prosecution or defense." Article 46, UCMJ.

a) *United States v. Gutierrez*, 57 M.J. 148 (2002). Chief of Justice, MAJ W, who testified on the merits in opposition to a defense motion to dismiss for lack of speedy trial and who later becomes the SJA, is disqualified from participating in the post-trial process. Error for MAJ W to prepare the PTR and the subsequent addendum. The court noted "Having actively participated in the preparation of the case against appellant, MAJ [W] was not in a position objectively to evaluate the fruits of her efforts." *Id.* at 149.

b) *United States v. Barry*, 57 M.J. 799 (Army Ct. Crim. App. 2002). Wrong SJA providing initial advice to CA and then ambiguous/unclear action because Division Rear Cdr signed action over a soldier assigned to the Division and signed as Commander of the Division and not the Division Rear.

c) *United States v. Johnson-Saunders*, 48 M.J. 74 (1998). The Assistant TC, as the Acting Chief of Military Justice, wrote the SJAR. The SJA added only one line, indicating he had reviewed and concurred with the SJAR. The DC did not object when served with the SJAR. Held – ATC disqualified to write the SJAR. No waiver and plain error; returned for a new SJAR and action. The Court stated what may become the test for non-statutory disqualification: whether the trial participation of the person preparing the SJAR "would cause a disinterested observer to doubt the fairness of the post-trial proceedings."

d) United States v. Sorrell, 47 M.J. 432 (1998). CoJ wrote the SJA's PTR. Dispute between the accused and the CoJ over whether the CoJ promised the accused he would recommend clemency if the accused testified against other soldiers (which he did). The Court avoids the issue; if there was error, it was harmless because the PTR recommended 6 months clemency, which the CA approved.

2. Also disqualified is the SJA who must review his own prior work (*United States v. Engle*, 1 M.J. 387 (C.M.A. 1976)); or his own testimony in some cases (*United States v. Rice*, 33 M.J. 451 (C.M.A. 1991)); *United States v. Choice*, 23 U.S.C.M.A. 329, 49 C.M.R. 663 (1975). *United States v. McCormick*, 34 M.J. 752 (N.M.C.M.R. 1992) (PTR insufficient if prepared by a disqualified person, even if filtered through and adopted by the SJA). *See* R.C.M. 1106(b) Discussion.

3. "Material factual dispute" or "legitimate factual controversy" required. *United States v. Lynch*, 39 M.J. 223, 228 (C.M.A. 1994*). See United States v. Bygrave*, 40 M.J. 839 (N.M.C.M.R. 1994) (PTR must come from one free from *any* connection with a controversy); United *States v. Edwards*, 45 M.J. 114 (1996). Legal officer (non-judge advocate) disqualified from preparing PTR because he had preferred the charges, interrogated the accused, and acted as evidence custodian in case. Mere prior participation does not disqualify, but involvement "far beyond that of a nominal accuser" did so here. Waiver did not apply, because defense did not know at time it submitted its post-trial matters.

4. Who is not disqualified?

a) The SJA who has participated in obtaining immunity or clemency for a witness in the case. *United States v. Decker*, 15 M.J. 416 (C.M.A. 1983).

b) Preparation of pretrial advice challenged at trial not automatically disqualifying; factual determination. *United States v. Caritativo*, 37 M.J. 175 (C.M.A. 1993).

c) *United States v. McDowell*, 59 M.J. 662 (2003). SJA whose initial SJAR is deemed defective on appeal is not per se disqualified when the error is a result of a change in the law as opposed to bad or erroneous advice. Changes in the law affecting the validity of an SJAR do not create a "personal interest" in the case; however, erroneous or bad advice in an SJAR, returned to the same SJA for a second review and action may disqualify that SJA if it is shown he or she has an other than official interest in the case.

5. How do you test for disqualification outside the scope of the rules? Do the officer's actions before or during trial create, or appear to create, a risk that the officer will be unable to evaluate the evidence objectively and impartially? *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). *See United States v. Kamyal*, 19 M.J. 802 (A.C.M.R. 1984) ("a substantial risk of prejudgment"). *United States v. Johnson-Saunders*, 48 M.J. 74 (1998) (whether the involvement by a disqualified person in the PTR preparation "would cause a disinterested observer to doubt the fairness of the post-trial proceedings." TC prepares and SJA concurs; CAAF returns for new SJA PTR and action).

6. R.C.M. 1106(c). When the CA has no SJA or SJA is disqualified (unable to evaluate objectively and impartially), CA must request assignment of an/another SJA, or forward record to another GCMCA. Make sure documentation is included in the record.

a) Informal agreement between SJAs is not sufficient. *United States v. Gavitt*, 37 M.J. 761 (A.C.M.R. 1993).

b) *United States v. Hall*, 39 M.J. 593 (A.C.M.R. 1994). SJA used incorrect procedure to obtain another SJA to perform post-trial functions. Court holds that failure to follow procedures can be waived.

c) Deputies DON'T write PTRs/SJARs. *United States v. Crenshaw*, Army 9501222 (Army Ct. Crim. App. 1996) (unpub.). Fact that Deputy Staff Judge Advocate (DSJA) improperly signed PTR as "Deputy SJA" rather than "Acting SJA" did not require corrective

action where PTR "contained nothing controversial" and where SJA signed addendum that adhered to DSJA's recommendation.

d) Who should author the SJA PTR? The SJA. *United States v. Finster*, 51 M.J. 185 (1999), where a non-qualified individual signed the SJA PTR the court concluded there was manifest prejudice.

C. Form and content: a *concise* written communication to assist in the exercise of command prerogative in acting on the sentence.

1. Findings and sentence. *United States v. Russett*, 40 M.J. 184 (C.M.A. 1994). Requirement for the SJA to comment on the multiplicity question arises when DC first raises the issue as part of the defense submission to the CA.

a) Accuracy most critical on charges and specs. *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994) (CMA disapproved findings on two specs omitted from PTR). *See also*, *United States v. Sanchez*, 54 M.J. 874 (Army Ct. Crim. App. 2001) (error in PTR alleging a finding of guilty to larceny as opposed to wrongful appropriation, however, no prejudice – finding of guilty to larceny set aside and replaced with a finding of guilty to wrongful appropriation and sentence affirmed after reassessment). *United States v. Lindsey*, 56 M.J. 850 (Army Ct. Crim. App. 2002). Finding of not guilty to specification reported in PTR as guilty. DC failed to comment on the error. Applying a waiver and plain error analysis, court held plain error, therefore, waiver did not apply. Unsure on the issue of prejudice, the court reduced the sentence by 2 months. "We are unsure of the impact of the error on appellant's request for clemency. To moot any possible claim of prejudice . . . and for the sake of judicial economy, we will take appropriate remedial action." *Id.* at 851. *But see United States v. Ross*, 44 M.J. 534, 536 (A.F. Ct. Crim. App. 1996) (improper dates for offense in PTR – July v. Sept. – not fatal when CA action reflected original, correct date of charge sheet; "we are reluctant to elevate 'typos' in dates to 'plain error'" *especially* when waived).

b) Some errors indulged, especially when defense does not notice or point them out. *See, e.g., United States v. Royster*, No. 9400201 (Army Ct. Crim. App. 1995) (unpub.); *United States v. Bernier*, 42 M.J. 521 (C.G.C.M.R. 1994); *United States v. Zaptin*, 41 M.J. 977 (N-M. Ct. Crim. App. 1995). *United States v. Gunkle*, 55 M.J. 26 (2001). The PTR incorrectly stated findings. Failed to reflect that the judge granted motions for a finding of not guilty and/or modification of charges. Defense failed to mention these errors in their R.C.M. 1105/6

submissions BUT did mention the judge's favorable rulings. The Court found no error.

2. Any clemency recommendations by the MJ or panel. R.C.M. 1106(d)(3)(b) [1995 change]. Do it here, not at the addendum stage.

a) *United States v. Paz-Medina*, 56 M.J. 501 (Army Ct. Crim. App. 2001). Plain error for the SJA to *omit* member's clemency recommendation regarding waiver of forfeitures from the PTR. CA action set aside; returned for new PTR and action. Court also commented on the slow post-trial processing stating "Because we are already returning the case for a new SJAR and action, the new SJA and convening authority will also be provided a discretionary opportunity to fashion an appropriate remedy for the untimely processing." *Id*. at 505.

b) *United States v. Williams*, 57 M.J. 1 (2002) (error for failing to serve DC with PTR prior to action when PTR omitted clemency recommendation from sentencing authority).

3. Summary of accused's service record. *See United States v. Austin*, 34 M.J. 1225 (N.M.C.M.R. 1992).

a) *United States v. DeMerse*, 37 M.J. 488 (C.M.A. 1993). Failure to note Vietnam awards and decorations was plain error, requiring that action be set aside.

b) *United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993). Error in omitting JSCM waived by failure to comment.

c) *United States v. McKinnon*, 38 M.J. 667 (A.C.M.R. 1993). Failure to comment on omission of several awards and decorations equals waiver.

d) *United States v. Thomas*, 39 M.J. 1078 (C.G.C.M.R. 1994). SJA not required to go beyond ROT and accused's service record in listing medals and awards in PTR.

e) *United States v. Perkins*, 40 M.J. 575 (N.M.C.M.R. 1994). SJA may rely on accused's official record in preparing PTR. No need to conduct inquiry into accuracy of record, particularly where accused does not question.

f) *United States v. Barnes*, 44 M.J. 680 (N-M. Ct. Crim. App. 1996). "There is no 'hard and fast rule' as to what errors or omissions in a post-trial recommendation so seriously affect the fairness and integrity of the proceedings as to require appellate relief." Accused, USMC staff sergeant with 14 years' service, no record of disciplinary problems, convicted of single use of marijuana. PTR failed to mention his Navy Commendation Medal, awarded for meritorious combat less than a year before trial. Court called the medal a "significant and worthy personal achievement. The failure to include these matters in the [PTR] deprives the [CA] of important information . . . and may well have affected the outcome of his sentence review. . . It is difficult to determine how a CA would have exercised his broad discretion if all of the information required by R.C.M. 1106(d)(3) had been available to him before he took his action." Here, the failure was prejudicial error, requiring a new PTR and action. Defense did a good job on appeal in showing value of NAVCOM by offering Navy Instruction setting forth criteria for the award.

g) *United States v. Brewick,* 47 M.J. 730 (N-M. Ct. Crim. App. 1997). SJA PTR failed to list SW Asia service awards. Held – waiver by DC, and no plain error. Distinguishes *DeMerse*, because those were combat awards, and old, which set DeMerse apart from other soldiers (so few remaining on active duty).

h) *United States v. Osuna*, 56 M.J. 620 (C.G. Ct. Crim. App. 2001). SJA PTR summarized accused's service record by reference to enclosures. For example, accused's awards are at enclosure 2, performance summary at enclosure 3, and nonjudicial punishment at enclosure 4. Held – summary was sufficient. Note – PTR erroneously stated that accused was sentenced, in a judge alone trial, by members. Court found error but not plain error, no prejudice and waiver by failing to timely object to the error. *See also United States v. Kittle*, 56 M.J. 835 (A.F. Ct. Crim. App. 2002) (no error in SJA PTR by inclusion of complete nonjudicial punishment actions in lieu of summarizing them).

i) *United States v. Mack*, 56 M.J. 786 (Army Ct. Crim. App. 2002). SJA's PTR need not include awards and decorations which are not supported by accused's service record admitted at trial (e.g., ORB) or established by stipulation of the parties. Failure to mention accused's Purple Heart was not error, "plain or otherwise." *Id.* at 790. Additionally, SJA's characterization of accused's service as "satisfactory" was not error. Finally, SJA need not comment on accused's clemency submission absent allegation of legal error. "The appellant suggests that we equate the SJA's decision not to comment on the appellant's extensive clemency matters as tantamount to

disagreeing with or disputing matters in the appellant's R.C.M. 1105 submission. We are aware of no authority to support the appellant's position, and we decline to establish such authority." *Id*.

j) *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). There is no controlling precedence that requires specific mention of a prior Honorable Discharge in the SJAR. Counsel should be aware, however, that R.C.M. 1106(d)(3)(C) requires "[a] summary of the accused's service record. To include length and character of service, awards and decorations received, and any records of nonjudicial punishment and previous convictions."

k) *United States v. Wellington*, 58 M.J. 420 (2003). Prejudicial error for the SJAR in an indecent assault, attempted rape, and attempted forcible sodomy to misstate the appellant's prior disciplinary actions. The SJAR indicated the appellant received two prior Field Grade Article 15s when in fact he had never received NJP. Additionally, the SJAR indicated no pretrial restraint when in fact the appellant was restricted prior to trial. Applying a plain error analysis (R.C.M. 1106(f)(6)) because the defense counsel failed to comment on the erroneous SJAR, the court found that the errors were both "'clear'" and "'obvious'." Next the court found prejudice from the error which, despite a service record lacking in any disciplinary action, "portrayed [the appellant] as a mediocre soldier who had twice received punishment from a field grade officer . . . . Appellant's 'best hope for sentence relief' was dashed by the inaccurate portrayal of his service record." Held – the erroneous SJAR amounted to plain error and the court would not speculate on what the CA would do if accurately advised by the SJA; the case was remanded for a new SJAR and action.

4. Nature and duration of any pretrial restraint.

a) "The accused was under no restraint;" or

b) "The accused served 67 days of pretrial confinement, which should be credited against his sentence to 8 years confinement."

c) *United States v. Allison*, 56 M.J. 606 (C.G. Ct. Crim. App. 2001). SJA's PTR failed to mention accused was subject to over four months of pretrial restriction. "In the interest of judicial economy," Court reduced accused's confinement from 18 months to 11 months, affirming the remaining punishment.

d) *United States v. Weber*, 56 M.J. 736 (C.G. Ct. Crim. App. 2002). Error for SJA to omit from PTR that accused was subject to over three months of pretrial restriction; however, applying *Wheelus*, 49 M.J. 283 (1988), accused failed to "make some colorable showing of possible prejudice" that would warrant relief. Some confinement disapproved on other grounds – that the accused was held in confinement beyond his proper release date.

e) *United States v. Miller*, 56 M.J. 764 (A.F. Ct. Crim. App. 2002). SJA's PTR failed to mention 3 days of PTC. Held – attachments to PTR (e.g., Report of Result of Trial and Personal Data Sheet) both stated 3 days of PTC; therefore, no error. Even if error, applying *Wheelus*, 49 M.J. 283 (1988), accused failed to make a "colorable showing of prejudice" that would warrant relief. Finally, Court noted that accused waived the issue by failing to raise a timely objection in the absence of plain error.

f) *United States v. Green*, 58 M.J. 855 (Army Ct. Crim. App. 2003). SJAR which erroneously stated "none" regarding pretrial restraint and which improperly stated the terms of the pretrial agreement did not rise to the level of plain error warranting relief by the court.

5. CA's obligation under any pretrial agreement. *See United States v. Green*, 58 M.J. 855 (Army Ct. Crim. App. 2003), *supra*.

6. Specific recommendations as to action.

7. NOTHING ELSE!!!

8. Legal sufficiency need *not* be reviewed. Exceptions:

a) If the SJA deems it appropriate to take corrective action on findings or sentence; or

b) If the accused alleges a legal error in the R.C.M. 1105 submission.

c) *United States v. Drayton*, 40 M.J. 447 (C.M.A. 1994). Weighing of evidence supporting findings of guilt limited to evidence introduced at trial.

d) *United States v. Haire*, 40 M.J. 530 (C.G.C.M.R. 1994). Legal issues raised in 1105 submission not discussed in SJA

recommendation; addressed for first time in addendum. No proof that addendum was served on DC. Action set aside.

9. Additional appropriate matters may be included in the recommendation even if taken from outside the record. R.C.M. 1106(d)(5). *See United States v. Due*, 21 M.J. 431 (C.M.A. 1986). *See also Drayton*, 40 M.J. 447 (C.M.A. 1994). Key – service on accused and counsel and opportunity to comment!

D. Two additional tips.

1. Use a certificate of service when providing the defense with the PTR. *United States v. McClelland*, 25 M.J. 903 (A.C.M.R. 1988). This logic should be extended to service of the accused's copy of the SJA's PTR. *See* R.C.M. 1106(f). *It is extremely self-defeating and short-sighted for the government not to follow this advice.*

2. List each enclosure (petitions for clemency, etc.) that goes to the CA on the PTR/addendum and/or have the convening authority initial and date all documents. *United States v. Hallums*, 26 M.J. 838 (A.C.M.R. 1988); *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989).

a) Query: What if the CA forgets to initial one written submission, but initials all the others? Have you just given the DC evidence to argue that the CG "failed to consider" a written defense submission?

b) *United States v. Blanch*, 29 M.J. 672 (A.F.C.M.R. 1989) (government entitled to enhance "paper trail" and establish that accused's 1105 matters were forwarded to and considered by the CA); *United States v. Joseph*, 36 M.J. 846 (A.C.M.R. 1993) (SJA's affidavit established that matters submitted were considered by CA before action).

c) *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002). Failure of SJA to prepare addendum to PTR advising CA to consider all matters (i.e., written maters) submitted by accused cured through post-trial affidavit from CA and SJA swearing that all clemency matters were considered by CA prior to action.

d) *United States v. Stephens*, 56 M.J. 391 (2002). CA's action stated that he "'specifically considered the results of trial, the record of trial, and the recommendation of the [SJA]'." *Id.* at 392. The CA's action did not list the accused's clemency matters. Held – no error since the evidence revealed the CA considered the addendum which included

the accused's clemency materials. "We decline to hold that a document embodying the [CA's] final action is defective simply because it refers to the SJA's recommendation without also referring to the attachments, such as an addendum or clemency materials." *Id*.

e) *United States v. Gaddy*, 54 M.J. 769 (A.F. Ct. Crim. App. 2001). The appellant submitted a single letter from his pastor in his 1105 matters. The SJA did not do an addendum accounting for the letter nor did the PTR advise the CA he had to consider all written submissions made by the appellant. According to the court, it can assume the CA considered all defense submissions when the SJA prepares an addendum which includes mention of the defense submissions, advises the CA that he must consider the matters submitted, and the addendum actually lists the matters submitted. If no addendum is prepared, the record must reflect that the CA was advised of his obligation to consider all written submissions from defense and there must be some evidence that the defense matters were actually considered. The court found prejudice and reduced the appellant's sentence by two months.

f) *United States v. Baker*, 54 M.J. 774 (A.F. Ct. Crim. App. 2001). There was no evidence in the record that the CA had considered the defense R.C.M. 1105 matters. SJA did not do an addendum to his PTR despite lengthy letter from accused requesting clemency. Affidavits obtained to establish that the CA considered the appellant's letter. Although the court found no prejudicial error, they decry the waste of appellate assets caused by the SJA failing to follow standard Air Force post-trial process. The court stated that they will be sending information to their TJAG about SJAs who commit egregious post-trial errors.

E. Errors in the recommendation.

1. Corrected on appeal without return to CA for action.

2. Returned for new recommendation and new action. *See United States v. Craig*, 28 M.J. 312 (C.M.A. 1989). "Since it is very difficult to determine how a convening authority would have exercised his broad discretion if the staff judge advocate had complied with R.C.M. 1106, a remand will usually be in order." *Id*. at 325, quoting *U.S. v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988). *See also*, *United States v. Reed*, 33 M.J. 98 (C.M.A. 1992); *United States v. Hamilton*, 47 M.J. 32 (1997). "This court has often observed that the convening authority is an accused's last best hope for clemency [citation omitted]. Clemency is the heart of the convening authority's responsibility at that stage of a case. If an SJA gives faulty advice in this regard, the impact is

particularly serious because no subsequent authority can adequately fix that mistake." *Id.* at 35.

a) *United States v. Pate*, 54 M.J. 501 (Army Ct. Crim. App. 2000). Accused was convicted at trial of several charges which were the basis of a prior Article 15. The SJA advised the CA of the Article 15 in his PTR and erroneously stated the Article 15 was set aside. Defense noted the error in the R.C.M. 1105/6 submissions and the SJA agreed with the defense in an addendum, which advised the CA he could not consider the Article 15 for any purpose other than granting *Pierce* credit to the appellant. Defense claimed that under *Pierce*, an Article 15 of this nature can not be used for any purpose, administrative or otherwise, and thus it was error for the SJA to mention it in the PTR. The Court disagreed, stating that *Pierce* does not require withholding this information from the CA. The Court went on to state that even if it did, the defense had failed to make a colorable showing of possible prejudice.

b) *United States v. Williams*, 54 M.J. 626 (N-M. Ct. Crim. App. 2000). SJA signed the PTR three days before the military judge authenticated the ROT. Defense claimed PTR was invalid because it was based on an unauthenticated record of trial (ROT) thus invalidating the CA's action. The Court disagreed – ROT had only received minor, non-substantive errata from the military judge and defense failed to raise any objection in the R.C.M. 1105/6 submissions. Court found no prejudice to the accused and noted that the issue was waived. *See also United States v. Smith*, 54 M.J. 783 (A.F. Ct. Crim. App. 2001) (PTR dated nine days before authentication of the ROT. Although the Court found no prejudice, they cautioned counsel in the field that "this sort of inattention to detail far too often creates unnecessary issues on appeal."). *Id.* at 788.

c) *United States v. Farence*, 57 M.J. 674 (C.G. Ct. Crim. App. 2002), *pet. denied*, 58 M.J. 203 (2003). Despite erroneous SJAR which advised the CA that the appellant was convicted of two offenses dismissed for sentencing purposes by the Military Judge, no corrective action was required when the appellant failed to make "some colorable showing of possible prejudice."

3. Waived absent plain error. **Rule for Courts-Martial 1106(f)(6)** provides that "[f]ailure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error."

a) In cases where neither the appellant nor his counsel raises any error in the SJAR either as an RCM 1106(f)(4) matter or on appeal, the reviewing court will apply a *Powell* (*United States v. Powell*, 49 M.J. 460, 463 (1998)) plain error analysis: (1) was there an error; (2) was the error plain and obvious; and (3) did the error materially prejudice a substantial right. *United States v. Scalo*, 59 M.J. 646 (Army Ct. Crim. App. 2003), *pet. granted*, 2004 CAAF LEXIS 590 (June 21, 2004). The reviewing court will not apply the lesser *Wheelus* standard of "some colorable showing of possible prejudice" to establish plain error in cases where the issues is not raised by the appellant either at or before action or on appeal. *Id*. at 650.

b) In cases where neither the appellant nor his counsel raises an allegation of error in the SJAR as an RCM 1106(f)(4) matter, but raises the error on appeal, the reviewing court will apply a *Powell-Wheelus* analysis (appellant need only show a "colorable showing of possible prejudice"). *United States v. Hartfield*, 53 M.J. 719, 720 (Army Ct. Crim. App. 2000). *E.g., United States v. Hammond*, 2004 CCA LEXIS 147 (Army Ct. Crim. App. June 29, 2004) (applying plain waiver analysis and finding it when SJAR misstated the maximum confinement as life without eligibility for parole when it was only six years).

F. No recommendation is needed for total acquittals or other final terminations without findings. THIS NOW INCLUDES FINDINGS OF NOT GUILTY ONLY BY REASON OF LACK OF MENTAL RESPONSIBILITY. *See* R.C.M. 1106(e).

G. Service of PTR on DC and the accused. R.C.M. 1106(f)(1).

1. Before forwarding the recommendation and the ROT to the CA for action, the SJA or legal officer shall cause a copy of the PTR to be served on counsel for the accused. A separate copy will be served on the accused.

a) *United States v. Hickok*, 45 M.J. 142 (1996). Failure to serve PTR on counsel is prejudicial error, even though counsel submitted matters before authentication of record and service of PTR. Original counsel PCSd, new counsel never appointed, and OSJA never tried to serve PTR. CAAF finds accused "was unrepresented in law and in fact" during this stage. Fact that R.C.M. 1105 clemency package was submitted at an early stage (and, all conceded, considered by CA at action) cannot compensate for the separate post-trial right to *respond* to the PTR under R.C.M. 1106. *United States v. Williams*, 57 M.J. 1 (2002) (error for failing to serve DC with PTR prior to action when PTR omitted clemency recommendation from sentencing authority).

b) *United States v. Klein*, 55 M.J. 752 (N-M. Ct. Crim. App. 2001). Failure to serve PTR on DC until five days after CA's action error but accused failed to make "some colorable showing of possible prejudice." Relief granted on other basis.

c) *United States v. Williams*, 57 M.J. 1 (2002). Action set aside because PTR which omitted required clemency recommendation from the MJ at sentencing served on DC day after action in the case.

d) *United States v. Smith*, 59 M.J. 604 (N-M. Ct. Crim. App. 2003). Failure to produce evidence of service of the SJAR on the appellant prior to action does not preclude approval of a punitive discharge despite language to the contrary in Rule for Courts-Martial (R.C.M.) 1107(d)(4) and 1103(c)(1). The court, after noting that R.C.M. 1107(d)(4) was "inartfully drafted," applied a "'whole statute' principle of statutory interpretation . . . considering the drafter's intent . . . and [considering] case law," rejected a literal reading of R.C.M. 1107(d)(4) and 1103(c)(1) which would require disapproval of a punitive discharge. Finally, the court noted that the appellant failed to make a colorable showing of possible prejudice from the alleged error.

2. Although normally submitted simultaneously, R.C.M. 1105 and R.C.M. 1106 submissions serve different purposes. R.C.M. 1105 submissions are the accused's submissions where R.C.M. 1106 focuses on submission by the accused's counsel.

3. If it is impracticable to serve the accused for reasons including but not limited to the transfer of the accused to a distant place, his AWOL, military exigency, or if the accused so requests on the record at court or in writing, the accused's copy shall be forwarded to the defense counsel. A statement shall be attached to the record explaining why the accused was not served personally.

a) *United States v. Ayala*, 38 M.J. 633 (A.C.M.R. 1993). Substitute service of ROT and PTR on DC authorized where accused is confined some distance away.

b) Mailing of recommendation is not impracticable where all parties are located in CONUS and the accused has provided a current mailing address. *United States v. Smith*, 37 M.J. 583 (N.M.C.M.R. 1993).

c) *United States v. Lowery*, 37 M.J. 1038 (A.C.M.R. 1993). Real issue in this area is whether accused and defense counsel have an opportunity to submit post-trial matters.

d) *United States v. Ray*, 37 M.J. 1053 (N.M.C.M.R. 1993). Mere failure to serve does not warrant relief; accused did not offer evidence to rebut presumption that SJA had properly executed duties, did not submit matters that would have been submitted to CA, and did not assert any inaccuracies in the recommendation.

e) *United States v. Ybarra*, 57 M.J. 807 (N-M. Ct. Crim. App. 2002), *pet. denied*, 58 M.J. 289 (2003). Failure to serve record of trial and SJAR on appellant as specifically requested by appellant does not warrant relief (i.e., no prejudice) when the appellant submitted a waiver of clemency and he failed, under *United States v. Wheelus*, 49 M.J. 283 (1998), to cite to any errors or omissions in the SJAR that he would have brought to the Convening Authority's attention had he been given the opportunity to do so.

4. The accused may designate at trial *which counsel* shall be served with the PTR or may designate such counsel in writing to the SJA before the PTR is served. Absent such a designation, the priority for service is: civilian counsel, individual military counsel and then detailed counsel.

5. If no civilian counsel exists and all military counsel have been relieved or are not reasonably available, substitute counsel shall be detailed by an appropriate authority. AR 27-10, para. 6-9 says the Chief, USATDS, or his delegee will detail defense counsel. *But see United States v. Johnson*, 26 M.J. 509 (A.C.M.R. 1988).

a) Substitution of counsel problems. R.C.M. 1106(f)(2).

(1) *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978) (substituted counsel must form attorney-client relationship with the accused; absent extraordinary circumstances, only the accused may terminate an existing relationship). *See also United States v. Miller*, 45 M.J. 149 (1996). Substitute defense counsel's failure to formally establish attorney-client relationship with accused found harmless, despite substitute counsel's failure to consult accused or submit clemency package. Detailed counsel (who later ETSd) had submitted clemency materials before service of PTR, and government was not on any reasonable notice that substitute counsel and accused failed to enter attorney-client relationship. In such circumstances, test for prejudice.

(2) *United States v. Howard*, 47 M.J. 104 (1997). Rejecting an invitation to overrule *Miller*, the CAAF restates that failure of the substitute DC to contact the client post-trial will be tested for prejudice. "Prejudice" does not require the accused to show that such contact and the resulting submission would have resulted in clemency; it only requires a showing that the accused would have been able to submit something to counter the SJA's PTR.

(3) *United States v. Antonio*, 20 M.J. 828 (A.C.M.R. 1985) (accused may waive the right to his former counsel by his acceptance of substitute counsel and his assent to representation).

(4) *United States v. Edwards*, 9 M.J. 94 (C.M.A. 1980) (permission of the accused not found in record); *United States v. Lolagne*, 11 M.J. 556 (A.C.M.R. 1981) (accused's permission presumed under the circumstances).

(5) *United States v. Hood*, 47 M.J. 95 (1997). Even if the substitute counsel does form the required attorney-client relationship, failure to discuss the accused's clemency packet with him prior to submission is deficient performance under the first prong of the *Strickland v. Washington* analysis.

(6) *United States v. Johnston,* 51 M.J. 185 (1999). The convening authority must insure that the accused is represented during post-trial. Submission of R.C.M. 1105 and 1106 matters is considered to be a critical point in the criminal proceedings against an accused.

b) If the accused alleges ineffective assistance of counsel (IAC) after trial, that counsel cannot be the one who is served with the PTR.

(1) *United States v. Cornelious*, 41 M.J. 397 (1995). Government on notice of likely IAC. Court remanded to determine whether accused substantially prejudiced.

(2) *United States v. Carter* 40 M.J. 102 (C.M.A. 1994). No conflict exists where DC is unaware of allegations.

(3) *United States v. Alomarestrada*, 39 M.J. 1068 (A.C.M.R. 1994) (dissatisfaction with outcome of trial does not always

equal attack on competence of counsel requiring appointment of substitute counsel).

(4) *United States v. Sombolay*, 37 M.J. 647 (A.C.M.R. 1993) (substitute counsel not required where allegations of ineffective assistance are made after submission of response to PTR).

(5) *United States v. Leaver*, 36 M.J. 133 (C.M.A. 1992).

6. Upon request, a copy of the ROT shall be provided for use by DC. DC should include this boilerplate language in the Post-Trial and Appellate Rights Forms.

H. Defense Counsel Submission. R.C.M. 1106(f)(4). "Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter."

1. *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975), required service of PTR on the DC before the CA can take action. DC's failure to object to errors in PTR response normally waives such errors. *See also United States v. Narine*, 14 M.J. 55 (C.M.A. 1982).

2. Response due within 10 days of service of PTR on both DC and accused and service of authenticated ROT on accused, whichever is later.

3. SJA may approve delay for R.C.M. 1105 (not R.C.M. 1106) matters for up to 20 days; only CA may disapprove. Note the distinction between the timelines and approval and/or disapproval authority when dealing with R.C.M. 1105 v. 1106 matters. See R.C.M. 1105(c)(1) and 1106(f)(3). Key – serve accused and counsel the authenticated ROT and PTR AT THE SAME TIME.

I. Staff Judge Advocate's Addendum. R.C.M. 1106(f)(7). "The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to respond."

1. Must address allegations of legal error. Rationale not required; "I have considered the defense allegation of legal error regarding _____. I disagree that this was legal error. In my opinion, no corrective action is necessary." *See United States v. McKinley,* 48 M.J. 280 (1998) and Judge Cox's statement in response to an allegation of legal error.

a) *See United States v. Keck*, 22 M.J. 755 (N.M.C.M.R. 1986). *See also United States v. Broussard*, 35 M.J. 665 (A.C.M.R. 1992) (addendum stating "I have carefully considered the enclosed matters and, in my opinion, corrective action with respect to the findings and sentence is not warranted" was an adequate statement of disagreement with the assertions of accused). Need give no rationale or analysis – mere disagreement and comment on the need for corrective action sufficient.

b) *United States v. Welker*, 44 M.J. 85 (1996). Although error for SJA not to respond to defense assertions of legal errors made in post-trial submissions, CAAF looked to record and determined there was no merit to the allegation of error raised by the Defense in the 1105/6 submissions. Consequently, held no prejudice to the accused by the SJA's failure to comment on the allegation of error raised by the Defense. Reaffirms the principle that a statement of agreement or disagreement, without statement of rationale, is OK. Court will test for prejudice. When (as here) the court finds no trial error, it will find no prejudice. *See also United States v. Jones*, 44 M.J. 242 (1996) (comments on preparation of ROT were "trivial"); *United States v. Hutchison*, 56 M.J. 756 (Army Ct. Crim. App. 2002).

c) *United States v. Sojfer*, 44 M.J. 603 (N-M. Ct. Crim. App. 1996). Seven page addendum recited alleged errors and said, "'*My recommendation remains unchanged: I recommend that you take action to approve the sentence as adjudged*' . . . He [SJA] made no other comment regarding the merit of the assigned errors." *Id*. at 611. Government argued that "only inference . . . is that the [SJA] disagreed with all of the errors that were raised. We agree." *Id*.

d) *United States v. Zimmer*, 56 M.J. 869 (Army Ct. Crim. App. 2002) (error for SJA not to respond to allegation of error regarding improper deferment denial).

2. Ambiguous, unclear defense submission. If the submission arguably alleges a legal error in the trial, the SJA must respond under R.C.M. 1106 and state whether corrective action is needed.

a) *United States v. Hill*, 27 M.J. 293 (C.M.A. 1988).

b) *United States v. Moore*, 27 M.J. 656 (A.C.M.R. 1988).

c) *United States v. Williams-Oatman*, 38 M.J. 602 (A.C.M.R. 1993) ("consideration of inadmissible evidence" is sufficient allegation of legal error).

d) *United States v. Hutchison*, 56 M.J. 756 (Army Ct. Crim. App. 2002). Unsupported claim of onerous and illegal pretrial punishment which was not raised at trial after specific Article 13 inquiry by Military Judge and raised for the first time in clemency submission does NOT allege legal error requiring comment by the SJA. Likewise, alleged undue, non-prejudicial post-trial delay does not raise an allegation of legal error requiring comment by the SJA.

3. Addenda containing "new matter" must be served on the defense. R.C.M. 1106(f)(7).

a) *United States v. Leal*, 44 M.J. 235 (1996). If the additional information is not part of the record, *i.e.*, transcript, consider it to be new matter. Not enough that it's "between the blue covers," because that would permit government to highlight and smuggle to CA evidence offered but not admitted. Here, the addendum referred to a letter of reprimand; the failure to serve the addendum required a new PTR and action by a new CA. *But see United States v. Brown*, 54 M.J. 289 (2000). New action not required where defense, on appeal, fails to proffer a possible response to the unserved addendum that "could have produced a different result." *Id.* at 293.

b) *United States v. Cook*, 43 M.J. 829 (A.F. Ct. Crim. App. 1996). In two post-trial memos the SJA advised the CA about the MJ's qualifications, experience, likelihood of accused's waiving administrative separation board, and minimizing effects of BCD. Court disapproved BCD because all of this was obviously outside the record and should have been served on accused with opportunity to comment. Remedy -- set aside BCD.

c) *United States v. Norment*, 34 M.J. 224 (C.M.A. 1992).

d) *United States v. Harris*, 43 M.J. 3 (Army Ct. Crim. App. 1995) (addendum referred first time to an Art. 15; new review and action required).

e) *United States v. Sliney*, No. 9400011 (Army Ct. Crim. App. 1995) (inclusion of letters from victim and victim-witness liaison required re-service; new action required). *Accord United States v. Haire*, 40 M.J. 530 (C.G.C.M.R. 1994).

f) *United States v. McCrimmons*, 39 M.J. 867 (N.M.C.M.R. 1994). Reference in addendum to 3 thefts, which formed basis for court-martial ("demonstrated by his past behavior that he is not trustworthy"), not "new matter."

g) *United States v. Heirs*, 29 M.J. 68 (C.M.A. 1989). The SJA erred by erroneously advising the CA in the addendum to the PTR that Heirs' admissions during the rejected providence inquiry could be used to support the findings of guilty once the accused challenged the sufficiency of the evidence post-trial.

h) *United States v. Trosper*, 47 M.J. 728 (N.M. Ct. Crim. App. 1997) CSM's memo to CG that he gave little weight to accused's alleged remorse was not served on DC. Court finds the memo did not constitute new matter, but simply a fair comment on the offense, and was not from outside the record. Even if new matter, NMCCA relies on the requirement from *United States v. Chatman*, 46 M.J. 321 (1997) that appellant demonstrate what he would have submitted to deny, counter, or explain the new matter. Appellate DC failed to do this and simply repeated the same argument trial defense counsel submitted during clemency.

i) *United States v. Cornwell*, 49 M.J. 491 (1998). CG asks the SJA whether the command supports the accused's request for clemency. The SJA calls the accused's commanders, then verbally relays their recommendations against clemency for the accused to the CG. The SJA then does an MFR to that effect, attaching it to the ROT. The CAAF says the SJA's advice to the CG is not new matter in the addendum under R.C.M 1106(f)(7), but may be matter under R.C.M. 1107(b)(3)(B)(iii) of which the accused's is not charged with the knowledge thereof. Again, even if such, CAAF says the defense did not indicate what they would have done in response, so *Chatman* standard not met.

j) *United States v. Anderson*, 53 M.J. 374 (2000). The submission of a note from the chief of staff to the convening authority which states "Lucky he didn't kill the SSgt. He's a thug, Sir." was new matter.

k) *United States v. Gilbreath*, 57 M.J. 57 (2002). Error for SJA, after a Judge Alone trial, not to serve addendum on defense which stated, in part "After hearing all matters, the jury determined a bad conduct discharge was appropriate and as such, I recommend you approve the sentence as adjudged." *Id.* at 59. Defense could have pointed out that 1. the trial was judge alone and 2. the sentencing authority did NOT consider the clemency submissions. Note – the court also questioned

whether the statement by the SJA was improper. "She [Defense Counsel] also could have made a persuasive argument that the staff judge advocate's recommendation that the convening authority defer to the judgment of the members was also legally improper." *Id.* at 62.

l) *United States v. Gilbreath*, 58 M.J. 661 (A.F. Ct. Crim. App. 2003). Insertion in the SJA's addendum of a statement of inability to locate appellant to serve her with post-trial documents constitutes "new matter" requiring service on the appellant's defense counsel and an opportunity to respond. The Government could have avoided this issue by complying with the substitute service provisions of R.C.M. 1106(f)(1) which simply require a statement in the record of trial explaining "why the accused was not served personally." Applying the standard for relief enunciated in *United States v. Chatman*, 46 M.J. 321 (1997) (appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter."), the court noted that the inability to locate appellant could be perceived by the Convening Authority (CA) as evidence of appellant's disobedience of orders because she failed to provide a valid leave address while on appellate leave. Additionally, the CA could view the comment as an indication of how little she cared about her case because she failed to provide a proper mailing address for issues associated with her case. In light of the potential adverse impact of the SJA's comments, the court found prejudice and determined that its charter to "do justice" mandated a new SJAR and action in the case. Id. at 665.

4. Addendum should remind CA of the requirement to review the accused's post-trial submissions. *United States v. Pelletier*, 31 M.J. 501 (A.F.C.M.R. 1990); *United States v. Ericson*, 37 M.J. 1011 (A.C.M.R. 1993).

a) *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990). Appellate courts will presume post-trial regularity if the SJA prepares an addendum that:

(1) Informs the CA that the accused submitted matters and that they are attached;

(2) Informs the CA that he *must consider* the accused's submissions; and

(3) Lists the attachments.

J. What if the accused submitted matters but there is no addendum?

1. *United States v. Godreau*, 31 M.J. 809 (A.F.C.M.R. 1990). Two conditions for a presumption of post-trial regularity:

a) There must be a statement in the PTR informing the CA that he must consider the accused's submissions.

b) There must be some means of determining that the CA in fact considered all post-trial materials submitted by the accused. Ideal: (1) list all attachments; (2) have the CA initials and dates all submissions in a "clearly indicated location."

2. If *Foy* requirements are not met, or if no addendum and the two *Godreau* conditions are not met, the government must submit an affidavit from the CA. *See United States v. Joseph*, 36 M.J. 846 (A.C.M.R. 1993).

3. "The best way to avoid a *Craig* [28 M.J. 321 (C.M.A. 1989)] problem is to prepare an addendum using the guidance in *Foy* and *Pelletier* to insure compliance with *Craig* and UCMJ, article 60(c). If this method is used, there will be no need to have the convening authority initial submissions or prepare an affidavit." *Godreau*, 31 M.J. at 812.

4. *United States v. Buller*, 46 M.J. 467 (1997). "[L]itigation can be avoided through the relatively simple process of serving the addendum on the accused in all cases, regardless whether it contains 'new matter'." *Id.* at 469, n.4.

5. *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002). Failure of SJA to prepare addendum to PTR advising CA to consider all matters (i.e., written maters) submitted by accused cured through post-trial affidavit from CA and SJA swearing that all clemency matters were considered by CA prior to action.

K. Common PTR, addendum errors:

1. Inaccurately reflects charges and specifications (especially dismissals, consolidations).

2. Inaccurately reflects the maximum punishment.

3. Omits, misapplies pretrial confinement (*Allen*, R.C.M. 305(k) credit).

4. Omits, misapplies Article 15 (*Pierce*) credit.

5. Approves greater than 2/3 forfeitures for periods of no confinement.

6. Approves (in Special Courts-Martial) forfeitures and fines (cumulatively) in excess of the court's jurisdictional limit.

7. Extraneous (and often erroneous) information – *Stick to the Basics!!*

XII. ACTION BY CONVENING AUTHORITY. ARTICLE 60, UCMJ; RCM 1107.

A. Who may act: The convening authority. *See United States v. Delp*, 31 M.J. 645 (A.F.C.M.R. 1990) (the person who convened the court).

1. *United States v. Solnick*, 39 M.J. 930 (N.M.C.M.R. 1994). Rule requiring CA to take action unless impractical requires that there be practical reason for transferring case from control of officer who convened court to superior after trial, and precludes superior from plucking case out of hand of CA for improper reason.

2. *United States v. Rivera-Cintron*, 29 M.J. 757 (A.C.M.R. 1989). Acting Commander not disqualified from taking action in case even though he had been initially detailed to sit on accused's panel.

3. *United States v. Cortes*, 29 M.J. 946 (A.C.M.R.), *pet. denied*, 31 M.J. 420 (C.M.A. 1990). After considering the Assistant Division Commander's affidavit, the court determined that the acting CA, who approved accused's sentence as adjudged, was not affected by the editorial written by the CA about the "slime that lives among us."

4. *United States v. Vith*, 34 M.J. 277 (C.M.A. 1992). Commander did not lose impartiality by being exposed to three pages of accused's immunized testimony in companion case; commander had no personal interest in the case and there was no appearance of vindictiveness.

5. *United States v. Mack*, 56 M.J. 786 (Army Ct. Crim. App. 2002). Installation Chaplain and staff officer to the CA stole over $73,000.00 from the Consolidated Chaplains' Fund (CCF). Although CA had a personal and professional relationship with accused, he was not disqualified from acting as CA absent evidence that he had a "personal interest in the outcome of the [accused's] case." *Id.* at 794. Court found that the CA was not an "accuser" as alleged by the accused and there was no error, plain or otherwise, by the CA taking action. Additionally, Court found accused waived the issue of CA as accuser absent plain (clear and obvious) error.

6. *United States v. Walker*, 56 M.J. 617 (A.F. Ct. Crim. App. 2001). CA's comments during visit to confinement facility established an "arbitrary and inflexible refusal to consider clemency," thus disqualifying him from acting in

accused's case. According to accused, CA, during a confinement visit, stated the following: "I have no sympathy for you guys, you made your own decisions and you put yourself in this situation. I'm not sympathetic, and I show no mercy for you. I hope you guys learn from this, but half of you will go on and try to cheat civilian laws and end up in a worst [sic] place than this." *Id*. at 618. Allegation by appellant went uncontested by the CA. Relief – action of CA set aside and returned to the Judge Advocate General for return to another SJA and CA for a PTR and action. Court noted that their opinion doesn't mean that the CA in question is forever disqualified from taking action in other cases. *See also United States v. Jeter*, 35. M.J. 442 (C.M.A. 1992); *United States v. Voorhees*, 50 M.J. 494 (1999).

7. *United States v. Barry*, 57 M.J. 799 (Army Ct. Crim. App. 2002). Absent a proper transfer of authority from one GCMCA to another, a transfer based on impracticability, a commander who did not convene the court lacks authority to act on the case. The appellant, assigned to the 10th Mountain Division (Light) [hereinafter 10th Mtn (L)] at all times relevant hereto, was convicted at a GCM convened by the Commander, 10th Mtn (L); however, action in his case was taken by the Commander, 10th Mtn (L)(R), who signed as Commander, 10th Mtn (L). Because of the apparent action by an improper convening authority, as well as concerns whether the SJA in the case was disqualified from providing legal advice, the case was returned for a new SJAR and action. *See also United States v. Newlove*, 59 M.J. 540 (Army Ct. Crim. App. 2003).

8. *United States v. Gudmundson*, 57 M.J. 493 (2002). Convening Authority (CA) who testifies on a controverted matter in a case is NOT per se disqualified from acting on the case. BG Fletcher, the CA authorized "Operation Nighthawk," the "inspection" that resulted in appellant's positive urinalysis result, and testified on the motion to suppress. Testimony by a CA indicating a "'personal connection with the case'" may result in disqualification whereas testimony of "'an official or disinterested *nature* only'" is not disqualifying. Where an appellant is aware of potential grounds for disqualification and fails to raise them, the issue is waived on appeal. *Id* at 495. In the case at bar, the appellant's clemency submissions, while reminding the CA of the fact that he previously testified in the appellant's court-martial, did not ask the CA to disqualify himself.

9. *United States v. Davis*, 58 M.J. 100 (2003). Convening Authority (CA) disqualification falls into two categories: category one involves cases where the CA is an accuser, has a personal interest in the outcome of the case, or has a personal bias toward the accused; category two is where the CA exhibits or displays *an* inelastic attitude toward the performance of his or her post-trial duties or responsibility. Comments by the CA in the appellant's drug case

that "people caught using illegal drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to him about their situations or their families['], or words to that effect" fall into category 2. Although CA's "need not appear indifferent to crime," they must maintain a "flexible mind" and a "balanced approach" when dealing with it. *Id*. at 103. The CA's comments reflect an inelastic or "inflexible" attitude toward his post-trial duties when dealing with drug cases and as such, he was disqualified from acting on the appellant's case. The decision of the lower court was revered, the action set aside and the case remanded for a new review and action by a different CA.

10. *United States v. Brown*, 57 M.J. 623 (N-M. Ct. Crim. App. 2002). Error for one SPCMCA to act on a case convened by another SPCMCA. Held – although Article 60, UCMJ, and Rule for Courts-Martial 1107(a) allow for a different Convening Authority than that who convened a case to act on a case, this is the exception rather than the rule and is allowed in situations where it is impracticable for the convening authority to act. Furthermore, in situations of impracticability, the transfer of the case is to an officer exercising general court-martial jurisdiction (OEGCMJ), not to another special court-martial convening authority. In the case at bar there was no showing of impracticability, the record of trial failed to contain any statement of impracticability as required by R.C.M. 1107, and the transfer of the case was not to an OEGCMJ; therefore, the action was set aside and the case remanded for a new action by a proper convening authority.

B. CA not automatically disqualified simply because prior action set aside. *United States v. Ralbovsky*, 32 M.J. 921 (A.F.C.M.R. 1991). Test – Does CA have an other than official interest or was he a member of the court-martial?

C. When to Act?

1. Cannot act before R.C.M. 1105(c) time periods have expired or submissions have been waived.

2. *United States v. Lowe*, 58 M.J. 261 (2003). Prejudicial error for the Convening Authority (CA) to act on the case prior to service of the SJAR on the appellant's defense counsel as required by R.C.M. 1106(f)(1). The plain language of R.C.M. 1106(f)(1) as well as Article 60, UCMJ establish, as a matter of right, the requirement for service of the SJAR PRIOR to action. The court noted:

> The opportunity to be heard before or after the convening authority considers his action on the case is simply not qualitatively the same as being heard at the time a convening authority takes action, anymore than the right to seek

> reconsideration of an appellate opinion is qualitatively the same as being heard on the initial appeal. "The essence of post-trial practice is basic fair play -- notice and an opportunity to respond." United States v. Leal, 44 M.J. 235, 237 (C.A.A.F. 1996).

Id. at 263. The appellant established some "colorable showing of possible prejudice" by showing that he was denied the opportunity to advise the CA of his gunshot wound and his future prognosis. Finally, the court provided some common sense guidance to military practitioners:

> Where there is a failure to comply with R.C.M. 1106(f), a more expeditious course would be to recall and modify the action rather than resort to three years of appellate litigation. The former would appear to be more in keeping with principles of judicial economy and military economy of force.

Id. at 264.

D. General considerations.

1. Not required to review for legal correctness or factual sufficiency. Action is within sole discretion of CA as a command prerogative.

2. *Must consider*:

a) Result of trial,

b) SJA recommendation, and

c) Accused's written submissions.

d) How "detailed" must the consideration be? "Congress intended to rely on the good faith of the convening authority in deciding how detailed his 'consideration' must be." *United States v. Davis*, 33 M.J. 13 (C.M.A. 1991).

e) Failure to consider two letters submitted by DC requires new review and action. *United States v. Dvonch*, 44 M.J. 531 (A.F. Ct. Crim. App. 1996).

f) *United States v. Osuna*, 56 M.J. 620 (C.G. Ct. Crim. App. 2001). Record of trial returned to CA where there was no evidence that the CA considered clemency letter by DC.

g) *United States v. Mooney*, Army 9500238 (Army Ct. Crim. App. June. 10, 1996) (memo op on reconsideration). Court determined that fax received "in sufficient time to forward it . . . through the Staff Judge Advocate to the convening authority." "[A]ppellant's articulate and well-reasoned R.C.M. 1105 clemency letter *through no fault of his own* was not submitted to the convening authority on time. We do not have sufficient information to determine [whose fault it was] . . . as our function is . . . not to allocate blame. The quality of the clemency letter . . . gives rise to the reasonable possibility that a [CA] would grant clemency based upon it. Thus . . . the appellant has been prejudiced . . ." (emphasis in original). Action set aside and returned to CA for new PTR and action.

Moral of story: Even if the Government is not at fault, accused may get new PTR and action. Send back to CA if record not yet forwarded for appeal.

h) *United States v. Roemhildt*, 37 M.J. 608 (A.C.M.R. 1993). CA and SJA not required to affirmatively state they have considered recommendation of FACMT. *Accord United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994).

i) *United States v. Ericson*, 37 M.J. 1011 (A.C.M.R. 1993). There must be *some tangible proof* that CA *saw and considered* clemency materials before taking action. *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002) (post-trial affidavits from SJA and CA suffice, although not the preferred method – use an addendum).

3. *May consider*:

a) Record of trial, personnel records of accused, and anything deemed appropriate, but if adverse to accused and from outside the record, then accused must be given an opportunity to rebut. *See United States v. Mann*, 22 M.J. 279 (C.M.A. 1986); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984).

b) *United States v. Harris*, 56 M.J. 480 (2002). CA properly considered accused's preenlistment criminal history, some of which occurred while the accused was a juvenile, history documented in the accused's enlistment waiver document contained within his Service Record Book (SRB), a personnel record of the accused which he had access to and could review during the clemency process. No requirement to provide the accused with prior notice that the CA

would consider the document since the SRB was part of the accused's personnel records and not "other matters."

4. CA need not meet with accused -- or anyone else. *United States v. Haire*, 44 M.J. 520 (C.G. Ct. Crim. App. 1996). CA not required to give personal appearance to accused. Even truer now, as this case relied on *Davis*, in which court had held that CA must consider videotape (no longer good law in light of 1998 statutory change). Requirement to "consider" only pertains to "'inanimate' matter that can be appended to a clemency request. We specifically reject the contention that a petitioner for clemency has a non-discretionary right to personally appear before the convening authority." *Id.* at 526.

5. No action on not guilty findings.

6. No action approving a sentence of an accused who lacks the capacity to understand or cooperate in post-trial proceedings.

E. Action on findings not required but permissible. *See* Manual for Courts-Martial (2002 Edition), United States, Appendix 16. Absent specific action on findings, the CA impliedly approves the correct findings reported in the SJA's post-trial recommendation.

1. *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994). "In the absence of contrary evidence, a convening authority who does not expressly address findings in the action impliedly acts in reliance on the statutorily required recommendation of the SJA, *see* Art. 60(d)(1983), and thus effectively purports to approve implicitly the findings as reported to the convening authority by the SJA." *Id.* at 337. *See also United States v. Henderson*, 56 M.J. 911 (Army Ct. Crim. App. 2002) (when faced with ambiguous or erroneous findings not expressly addressed by CA in his action, the Court can either return the case to the CA for clarification (i.e., new PTR and action) or affirm only those findings of guilty that are correct and unambiguous in the PTR).

2. *United States v. Lindsey*, 56 M.J. 850 (Army Ct. Crim. App. 2002). SJA's PTR erroneously stated findings and CA implicitly approved the findings as reported by the SJA. PTR reported a guilty finding to Specification 4 of the Charge when in fact the accused was found not guilty of this offense. The Court only affirmed the proper findings and reduced the accused's period of confinement from 12 months to ten months. The Court commented on the lack of attention to detail in the post-trial processing:

> This case presents the court with yet another incident in which an SJA has failed to provide complete and accurate information to the convening authority, as required by R.C.M. 1106. The regularity of these post-trial processing errors is alarming and occurs in many jurisdictions. Most SJAR errors are the direct result of sloppiness and a lack of attention to detail exhibited by the SJA, Deputy SJA, and the Chief of Criminal Law. Likewise, diligent trial defense counsel should identify and correct such errors whenever possible. See R.C.M. 1106(f)(4), (f)(6). These errors reflect poorly on our military justice system and on those individuals who implement that system. They should not occur!

Id. at 851. In the footnote to the above quoted language, the Court referred to 35 cases out of 19 jurisdictions, covering a 15-month period, with erroneous PTRs.

3. *United States v. Saunders III*, 56 M.J. 930 (Army Ct. Crim. App. 2002). The SJAR erroneously advised the Convening Authority that the appellant was convicted of six specifications of violating a no-contact order, as opposed to five, and adultery (i.e., Spec 1 of Chg I and Spec 2 of Addt'l Chg I respectively). Applying *United States v. Wheelus*, 49 M.J. 283 (1998), the court found that despite the erroneous SJAR, the appellant failed to make a "colorable showing of possible prejudice to his substantial rights concerning the approved sentence." *Id.* at 936. The erroneous findings of guilty were set aside and the affected specifications dismissed; the sentence was affirmed.

F. Action on sentence must:

1. *Explicitly state approval or disapproval.*

a) *United States v. Schiaffo*, 43 M.J. 835 (Army Ct. Crim. App. 1996). Action did not expressly approve the BCD, though it referred to it in "except for" executing language. Sent back to CA for new action. Note the problem:

> "In the case of ... only so much of the sentence as provides for reduction to Private E1, forfeiture of $569.00 pay per month for six months, and confinement for four months is approved and, *except for the part of the sentencing extending to bad-conduct discharge,* will be executed."

b) Common Problem. *See United States v. Reilly*, No. 9701756 (Army Ct. Crim. App., June 12, 1998) and *United States v. Scott*, No. 9601465 (Army Ct. Crim. App., June 12, 1998). Both cases involved

errors by the SJA in preparing the CA's action. While the SJA PTR correctly said the CA could approve TF, E1, 15 months and a BCD, the CA's action said "only so much of the sentence as provided for reduction to E1, TF and confinement for 15 months is approved, *and except that portion extending to the Bad Conduct Discharge*, shall be executed." Promulgating order had same ambiguity. Held – returned to CA for a new, unambiguous action.

c) *United States v. Klein*, 55 M.J. 752 (N-M. Ct. Crim. App. 2001). Action by CA stated: "In the case of . . . the sentence is approved, but the execution of that part of the sentence extending to confinement in excess of 28 days was suspended for a period of 4 months from the date of trial . . . The part of the sentence extending to the bad conduct (sic) discharge will be suspended for a period of 12 months from the date of trial, at which time, unless the suspension is sooner vacated, it will be remitted without further action." After the appellate court acquired jurisdiction, CA attempted to withdraw the first action and replace a second wherein the punitive discharge was not suspended, stating he never intended to suspend the discharge. Held – "administrative oversight" as opposed to "clerical error" in CA's action does not warrant return to the CA for a corrected action. Additionally, any purported action by the CA after an appellate court acquires jurisdiction is a nullity. Court distinguishes this case from *United States v. Smith*, 44 M.J. 788 (N-M. Ct. Crim. App. 1996) stating "Unlike *Smith*, there is nothing 'illegal, erroneous, incomplete or ambiguous' in the original action." *Id*. at 756.

2. *Cannot increase adjudged sentence*.

a) *United States v. Jennings*, 44 M.J. 658 (C.G. Ct. Crim. App. 1996). MJ announced five month sentence, but did not expressly include pretrial confinement (PTC) credit. After issue raised, MJ said on record that he had "considered" the 8 days PTC before announcing the sentence, and the SJA recommended that the CA approve the sentence as adjudged (he did).

> "Further clarification by the judge was needed to dispel the ambiguity . . . created by his remarks." SJA "should have returned the record to the judge for clarification pursuant to R.C.M. 1009(d), rather than attempt to dispel the ambiguity of intent himself." "*In any event, there is no authority whatsoever for a staff judge advocate to make an upward interpretation of the sentence, as was done in this case.*"

Id. at 662.

b) *United States v. Koljbornsen*, 56 M.J. 805 (C.G. Ct. Crim. App. 2002). Appellant, convicted at a GCM of one specification of failure to obey a lawful general order and 14 specifications of possession of child pornography, was sentenced to a DD, 12 months confinement, and reduction to E-1. The pretrial agreement required the Convening Authority (CA) to suspend any confinement in excess of ten months and to defer the forfeitures in the case until action and thereafter waive forfeitures for an additional six months. Prior to action, the SJA provided the CA with two SJARs, the first recommending approval of ten months confinement and suspension of two months and the second, recommending approval of three and one-half months confinement. At action, the CA approved "only so much of the sentence as provides for a BCD, confinement for 3 months, and reduction to E-1." The action further stated "the execution of that part of the sentence extending to confinement in excess of 3 months is suspended for 12 months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action." On appeal, the court noted the ambiguity of the action and stated it had two options: 1. return the case to the CA for a new SJAR and action to clarify the ambiguity or 2. to construe the ambiguity itself and resolve any inconsistencies in favor of the appellant. The court chose the latter and affirmed only so much of the sentence as provided for BCD, confinement for three months, and reduction to E-1. As for the forfeitures issue, finance had not taken any forfeitures prior to action, therefore, the court treated the forfeitures prior to action to have been "deferred" by virtue of the CA's action. In choosing to act on the case itself, the court noted their concern that any clarifying action by the CA which resulted in an increase in confinement (i.e., up from three months) could be seen as an illegal post-trial increase in confinement.

c) *United States v. Shoemaker*, 58 M.J. 789 (A.F. Ct. Crim. App. 2003). At action the first time, the Convening Authority (CA) approved only 30 days confinement of a 3 month sentence. On appeal, the action was set aside and the case returned for a new SJAR and action. In the subsequent action, the CA approved a sentence of one-month. Unfortunately, 7 months out of the year contain 31 days resulting in a potential sentence greater than that originally approved, in violation of R.C.M. 810(d). Rather than return the case for a third SJAR and action, the court only approved 30 days confinement.

d) *United States v. Mitchell*, 58 M.J. 446 (2003). Appellant was tried and convicted at a GCM of, among other offenses, 5 drug distribution specifications and sentenced to a bad conduct discharge, 10 years

confinement, total forfeitures, and reduction to E-1. On appeal, the ACCA set aside two distribution specifications and ordered a rehearing on sentence. On rehearing, the appellant was sentenced to a dishonorable discharge, 6 years confinement, and reduction to E-1. ACCA affirmed the rehearing sentence finding that under an objective standard, a reasonable person would not view the rehearing sentence as "in excess of or more severe than" the original sentence; therefore, Art. 63, UCMJ, and R.C.M. 810(d)(1) were not violated. The CAAF reversed, as to sentence, finding that a dishonorable discharge is more severe than a bad conduct discharge and no objective equivalence is available when comparing a punitive discharge with confinement. The CAAF affirmed only so much of the sentence as provided for a bad conduct discharge, 6 years confinement, and reduction to E-1.

3. *May disapprove all or any part* of a sentence for any or no reason.

a) *United States v. Bono*, 26 M.J. 240 (C.M.A. 1988) (reduction in sentence saved the case when DC found to be ineffective during sentencing).

b) *United States v. Smith*, 47 M.J. 630 (Army Ct. Crim. App. 1997). At a GCM, the accused was sentenced to TF, but no confinement. Neither the DC nor the accused submitted a request for waiver or deferment, nor complained about the sentence. Accused did not go on voluntary excess leave. Fourteen days after sentence, TF went into effect. At action, the CA tried to suspend all forfeitures beyond 2/3 until the accused was placed on involuntary excess leave. Held – CA's attempt to suspend was invalid, because the TF was executed (at 14 days) prior to the attempted suspension. The Army Court found the time the accused spent in the unit (5 Jul to 19 Aug) without pay was cruel and unusual punishment and directed the accused be restored 1/3 of her pay. *See also United States v. Warner*, 25 M.J. 64 (C.M.A. 1987).

4. *May reduce a mandatory sentence adjudged*.

5. *May change a punishment* to one of a different nature if less severe. *United States v. Carter*, 45 M.J. 168 (1996). CA lawfully converted panel's BCD and 12 month sentence to 24 *additional* months' confinement and no BCD, acting in response to request that accused be permitted to retire. Commutation must be clement, "not 'merely a substitution'" of sentences, but clearly was proper here; BCD was disapproved and accused got his wish to retire, and where, importantly, he neither set any conditions on the commutation (*e.g.*, setting a cap on confinement he was willing to endure), nor protested the commutation in his submission to the CA. *But* consider the

Discussion to R.C.M. 1107(d)(1) that a BCD can be converted to 6 months of confinement. *See also United States v. Mitchell*, 56 M.J. 936 (Army Ct. Crim. App. 2002), *supra*.

6. *May suspend a punishment*. *United States v. Barraza*, 44 M.J. 622 (N-M. Ct. Crim. App. 1996). Court approved CA's reduction of confinement time from PTA-required 46 months (suspended for 12 months) to 14 months, 6 days (suspended for 36 months). Sentence was for 10 years. Court emphasized the "sole discretionary power" of CA to approve or change punishments "as long as the severity of the punishment is not increased" (*citing* R.C.M. 1107(d)(1)). Also significant that approved confinement was 22 months less than accused sought in his clemency petition.

7. *United States v. Emminizer*, 56 M.J. 441 (2002). Error for SJA in PTR to advise CA that in order to waive automatic forfeitures at action he would have to disapprove the adjudged forfeitures. CA could have modified the monetary amount of adjudged forfeitures and/or suspended the forfeitures for the period of waiver. Case returned to the CA for a new PTR and action.

8. *May reassess sentence*. If a convening authority reassesses sentence after, for example, dismissing guilty findings, the CA must do so in conformity with the requirements of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). *United States v. Harris*, 53 M.J. 86 (2000). The convening authority may purge any prejudicial effect if it can determine that the sentence would have been of a certain magnitude. Further, the SJAR must provide guidance to the CA as the standard to apply in reassessing the sentence. *United States v. Reed*, 33 M.J. 98 (C.M.A. 1991).

a) *United States v. Bridges*, 58 M.J. 540 (C.G. Ct. Crim. App. 2003). Appellant convicted of two specifications of indecent acts with a child, one specification of rape of a child under twelve, and one specification of forcible sodomy upon a child under twelve, and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for twenty-two years, and a DD. At action, the Convening Authority (CA) disapproved the findings related to one specification of indecent acts and forcible sodomy and approved only so much of the sentence as provided for reduction to E-1, forfeiture of all pay and allowances, confinement for twenty years, and a DD. The Coast Guard Court held that the CA erred in attempting to reassess the sentence after dismissing two very serious specifications. Although the maximum punishment for the offenses both before and after action remained the same (i.e., reduction to E-1, forfeiture of all pay and allowances, confinement for life, and a DD), the issue was whether the CA or the court could "accurately determine the sentence which the members would have adjudged for only those charges and specifications

approved by the convening authority." *Id*. at 545. The court determined that neither the CA nor the court could properly reassess the sentence in light of the modified findings, set aside the sentence and authorized a rehearing.

b) *United States v. Meek*, 58 M.J. 579 (C.G. Ct. Crim. App. 2003). Appellant convicted of unauthorized absence (UA) terminated by apprehension (a lesser-included offense of the original desertion charge), missing movement by design, and wrongful use of marijuana and sentenced to reduction to E-1, seventy-five days confinement, and a BCD. At action, the Staff Judge Advocate (SJA) recommended disapproval of the UA charge, a recommendation based on a pretrial agreement where the Government agreed to withdraw and dismiss the desertion charge. The SJA further recommended "I do not recommend that you adjust the accused's sentence as a result of setting aside the military judge's findings as to Charge I and its specification. The two remaining charges to which the accused pled guilty adequately support the sentence awarded." *Id*. at 580. The Court Guard Court held that the SJA erred by giving the above guidance and by failing to advise the CA that he must reassess the sentence, approving only so much of the sentence as would have been adjudged without the dismissed charge of desertion. Believing that the military judge would not have adjudged the same sentence without the UA charge and that the CA would not have approved the adjudged sentence had he properly reassessed the sentence, the court took remedial action, rather than returning the case for a new recommendation and action, approving only so much of the sentence as provided for reduction to E-1, sixty days confinement, and a BCD.

G. Sentence Credits.

1. *United States v. Minyen*, 57 M.J. 804 (C.G. Ct. Crim. App. 2002). Although the court recommends stating all sentence credits in the Convening Authority's action, it is not required. *See also United States v. Gunderson*, 54 M.J. 593, 594 (C.G. Ct. Crim. App. 2000) (recommending that a Convening Authority expressly state all applicable credits in the action).

2. AR 27-10 (para. 5-31a) states that "the convening authority will show in his or her initial action all credits against a sentence to confinement, either as adjudged or approved, regardless of the source of the credit (automatic credit for pretrial confinement under U.S. v. Allen, 17 M.J. 126 (CMA 1984), or judge-ordered additional administrative credit under U.S. v. Suzuki, 14 M.J. 491 (CMA 193)), R.C.M. 304, R.C.M. 305, or for any other reason specified by the judge."

H. Original signed and dated action must be included in the record. *See* R.C.M. 1107(f)(1) and 1103(b)(2)(D)(iv).

I. Contents of action. *See* Appendix 16, MCM, Forms for Actions.

J. If confinement is ordered executed, "the convening authority shall designate the place . . . in the action, unless otherwise prescribed by the Secretary concerned."

1. AR 27-10 (para. 5-31) says do not designate a place of confinement. AR 190-47 controls.

2. JAGMAN Section 0123e "*Designation of places of confinement*. The convening authority of a court-martial sentencing an accused to confinement is a competent authority to designate the place of temporary custody or confinement of naval prisoners."

3. AF Reg 111-1, para. 15-10a. "Designated Confinement. Normally, a place of confinement . . . will be named in the . . .[CA's] action."

K. What if an error is discovered after action is taken? R.C.M. 1107(f)(2) provides that:

1. BEFORE publication OR official notice to the accused, CA may recall and modify any aspect of action (including modification less favorable to the accused, such as adding the discharge approval language, as was required in *Schiaffo supra*).

2. IF EITHER publication OR official notice has occurred, CA may only make changes that do not result in action less favorable to the accused.

3. CA must personally sign the modified action.

4. Action AFTER appellate court has the case is a nullity unless subsequent action is directed or case is returned to the CA for further action. *United States v. Klein*, 55 M.J. 752 (N-M. Ct. Crim. App. 2001).

L. Action potpourri.

1. CA must direct in post-trial action award of any R.C.M. 305(k) credit for illegal pretrial confinement. In the interest of discouraging deliberate or negligent disregard of the rules, CMA returns action to CA for correction. *United States v. Stanford*, 37 M.J. 388 (C.M.A. 1993).

2. Message, Headquarters, Department of Army, DAJA-CL, Subject: Sentence Credit (221600Z June 94). Effective 1 Aug. 94, CA actions will state number of days of sentence credit for ALL types of pretrial confinement.

3. "The convening authority will show in his or her initial action all credits against a sentence to confinement, either as adjudged or as approved, regardless of the source of the credit (automatic credit for pretrial confinement under U.S. v. Allen, 17 M.J. 126 (CMA 1984), or judge-ordered additional administrative credit under U.S. v. Suzuki, 14 M.J. 491 (CMA 1983)), R.C.M. 304, R.C.M. 305, or for any other reason specified by the judge." AR 27-10, para. 5-31a.

4. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993). Sentence, for purposes of commutation, begins to run on date announced.

5. *United States v. Foster*, 40 M.J. 552 (A.C.M.R. 1994). Court does not have to treat ambiguous action ($214 per month) as forfeiture for one month; may return to CA for clarification of intent.

6. *United States v. Muirhead,* 48 MJ 527 (N-M. Ct. Crim. App. 1998). Accused sentenced to "forfeit all pay and allowances, which is $854.40 for 2 years," and CA approved the same. Held – ambiguous sentence. CA under R.C.M. 1107(d)(1) can return case to court for clarification of ambiguous sentence; if he does not, he can only approve a sentence no more severe than the unambiguous portion. Rather than return to CA, the Court simply affirmed the unambiguous dollar amount.

M. Post-trial deals. *United States v. O'Lean*, 59 M.J. 561 (C.G. Ct. Crim. App. 2002). Convening authority (CA) authorized to enter into post-trial deals where a rehearing is impracticable. In the case at bar, the CA agreed to approve a sentence of no punishment, dismiss the specifications which were set aside and returned for a rehearing, process the appellant for administrative discharge, and recommend a General Discharge. In exchange, the appellant agreed to waive personal appearance before the separation board, remain on appellate leave, and waive any right to accrued pay, allowances, or travel entitlements.

XIII. POST-TRIAL PROCESSING TIME.

A. From sentence to action:

1. The old rule: *Dunlap v. Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974) (when an accused is continuously under restraint after trial, the convening authority must take action within 90 days of the end of trial or a presumption of prejudice arises).

2. The current rule: if prejudice, relief mandated. *United States v. Banks*, 7 M.J. 92 (C.M.A. 1976).

a) *United States v. Bigelow*, 57 M.J. 64 (2002). Two hundred and forty-four (244) days after trial, the CA took action in the accused's case, approving the sentence as adjudged. The Record of Trial (ROT) was 593 pages. The AFCCA affirmed the findings and sentence, finding that the 244-day time frame from trial to action was explained and was not inordinate under the circumstances of the case, citing, among other reasons, the length of the ROT, the location of the key participants (i.e., the TC, TDC, and MJ were assigned to three different bases in Europe), and the numerous errors in the record requiring multiple errata reviews and corrections by the MJ. The AFCCA went on to add that even if the delay were unexplained or inordinate, the appellant failed to show specific prejudice that would warrant relief. *United States v. Bigelow*, 55 M.J. 531 (A.F. Ct. Crim. App. 2001). Held – the delay in post-trial processing was "'neither unexplained nor inordinate'," affirming the decision of the AFCCA. The CAAF did not address the lack of prejudice to the appellant.

b) *United States v. Williams*, 55 M.J. 302 (2001). An extraordinary delay of 753 days to complete the post-trial process, from sentence to action does NOT warrant relief absent prejudice. Appellant failed to show prejudice. The CAAF however reiterated that "[d]elay will not be tolerated if there is any indication that appellant was prejudiced as a result."

c) *United States v. Williams*, 42 M.J. 791 (N-M. Ct. Crim. App. 1995). Record lost for 5 years after trial. Accused's BCD was never executed but he did serve 50 days confinement per a PTA. Main argument on appeal – lost employment opportunities because his company could not bid for government contracts given that he was still on active duty (appellate leave). Court found this insufficient, especially in light of his plea of guilty, but did grant sentence relief, refusing to affirm the BCD. Chides USN severely, saying not result of "inexperienced sailors or Marines" but "the inattention, dereliction, or incompetence of legally trained personnel." Suggests that someone "be held accountable for the delays" under Art. 98. *Id.* at 794.

d) *United States v. Jenkins*, 38 M.J. 287 (C.M.A. 1993). Claims of lost employment opportunity, inability to participate in state programs for home buying by veterans, and lost accrued leave, all resulting from post-trial delay not sufficient to warrant relief from findings and sentence.

e) *United States v. Giroux*, 37 M.J. 553 (C.M.A. 1993). Court cautions supervisory judge advocates to avoid over-emphasizing the importance of court-martial processing time to their SJAs (parties entered in post-trial agreement whereby accused would accept responsibility for post-trial processing time in exchange for clemency from CA).

f) *United States v. Richter*, 37 M.J. 615 (A.C.M.R. 1993). Delay of five months from authentication to action did not prejudice accused.

g) *United States v. Dupree*, 37 M.J. 1089 (N.M.C.M.R. 1993). Delay before CA action warrants relief only if delay is unjustified and inordinate, and there is some demonstrable prejudice to the accused.

h) *United States v. Greening*, 54 M.J. 831 (C.G. Ct. Crim. App. 2001) (post-trial delay absent prejudice does not entitle accused to relief).

i) *United States v. Tardif*, 55 M.J. 666 (C.G. Ct. Crim. App. 2001), *rev'd and remanded*, 57 M.J. 219. The appellant was convicted of AWOL and two specifications of assault on a child under the age of 16 and sentenced to forfeiture of all pay and allowances, reduction to E1, three years confinement and a DD (the CA only approved two years of confinement). It took the government one-year to process the record from sentencing to action and forwarding to the appellate court. Despite the delay, the CGCCA could find no prejudice that flowed to the accused from the post-trial delay and therefore did not grant any relief. Although the CGCCA did discuss the Army's *Collazo* opinion, it concluded it was bound by the CAAF's precedence regarding undue post-trial delay. On appeal, the CAAF noted that relief under Article 66(c), UCMJ, unlike Article 59(a), UCMJ, does not require a predicate showing of "error materially [prejudicial to] the substantial rights of the accused" and remanded the case to the CGCCA because of the lower court's mistaken belief that it was "constrained" by Article 59(a), UCMJ. Applying principles of sentence appropriateness, CCAs can grant relief under Article 66(c) for unreasonable and unexplained post-trial delay that does not result in prejudice.

j) *United States v. Dezotell*, 58 M.J. 517 (N-M. Ct. Crim. App. 2003). Although the post-trial processing in appellant's case took nearly 14 months, the appellant failed to allege any prejudice resulting from the delay. Acknowledging its authority under *United States v. Tardif*, 57 M.J. 219 (2002), the court declined to grant relief absent a showing of prejudice.

k) *United States v. Khamsouk*, 58 M.J. 560 (N-M. Ct. Crim. App. 2003). Twenty-month delay from sentence to action did not warrant relief for dilatory post-trial processing. Commenting on the delay, the court noted that there was a "reasonable, although not entirely satisfactory explanation for the delay in the CA's [Convening Authority's] action." *Id.* at 562. Over half of the 20-month delay was attributed to the Military Judge (MJ) who took 13 months to authenticate the record of trial. After finding that the MJ's delay was a reasonable explanation why the CA could not act in the case at an earlier time, the court went on to point out that the defense counsel could have sought a post-trial 39(a) session to demand speedy post-trial processing since the MJ still controlled the case. Rather than complain or seek relief, neither the appellant nor his counsel raised post-trial processing as an issue until after receiving the Staff Judge Advocate's post-trial recommendation.

l) *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). Delay of 290 days in appellant's guilty plea case does not warrant relief for dilatory post-trial processing. Failing to cite any prejudice other than delay itself, the court elected not to exercise its power to grant relief, noting that "relief pursuant to Article 66(c), UCMJ [for post-trial delay] should only be granted under the most extraordinary of circumstances." *Id.* at 775. Of significance was the appellant's post-trial silence (i.e., failure to complain regarding the post-trial processing).

> [N]either Appellant nor trial defense counsel raised the issue of delay with the military judge or the SJA [Staff Judge Advocate] or the CA [Convening Authority] during the entire post-trial processing period. Appellant raises it for the first time on appeal. . . . Appellant's lengthy silence is strong evidence that he suffered no harm and that this is not an appropriate case for this court to exercise its Article 66(c), UCMJ, authority.

Id.

3. Army Court of Criminal Appeals and the Exercise of its Article 66, Sentence Appropriateness Authority – Prejudice Not Required for Relief from Post-Trial Delay.

a) *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000). The Army Court has come up with a new method for dealing with post-trial processing time delay. In *Collazo* the Court granted the appellant four months off of his confinement because the Government

did not exercise due diligence in processing the record of trial. The court expressly found no prejudice.

b) *United States v. Bauerbach*, 55 M.J. 501 (Army Ct. Crim. App. 2001). The only allegation of error was undue delay in the post-trial process. Defense sought relief in accordance with *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000). Applying *Collazo*, the court found that the Government did not proceed with due diligence in the post-trial process when it took 288 days to process a 384-page record of trial. Although no prejudice was established, the court granted relief under its Article 66, sentence appropriateness, authority reducing confinement by one month. The court did provide valuable guidance to SJAs and Chiefs of Criminal Law regarding what might justify lengthy post-trial delay (remembering that the court will test whether the government has proceeded with due diligence in the post-trial process based on the totality of the circumstances). "Acceptable explanations may include excessive defense delays in the submission of R.C.M. 1105 matters, post-trial absence or mental illness of the accused, exceptionally heavy military justice post-trial workload, or unavoidable delays as a result of operational deployments. Generally, routine court reporter problems are not an acceptable explanation." *Bauerbach*, 55 M.J. at 507.

c) *United States v. Delvalle*, 55 M.J. 648 (A.C.C.A 2001) (ten months to prepare 459-page ROT – too long; sentence reduced by two months).

d) *United States v. Maxwell*, 56 M.J. 928 (Army Ct. Crim. App. 2002). Appellant was convicted at a GCM of desertion terminated by apprehension and wrongful appropriation of a motor vehicle. The adjudged and approved sentence was confinement for five months and a BCD. On appeal, appellant alleged undue delay in the post-trial processing of her case. Held – 14 months from trial to action in a case where the ROT is only 384 pages is an excessive delay that warrants relief under *Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000) and *Bauerbach*, 55 M.J. 501 (Army Ct. Crim. App. 2001). Note – Appellant failed to cite any prejudice resulting from the delay, however, the ACCA, in exercise of its Article 66, UCMJ, authority affirmed the findings and reduced the period of confinement from five to four months. *See also*, *United States v. Paz-Medina*, 56 M.J. 501 (Army Ct. Crim. App. 2002) (one year delay in post-trial processing of 718-page ROT unreasonable and indicates a lack of due diligence). *United States v. Hutchison*, 56 M.J. 756 (Army Ct. Crim. App. 2002) (419 day delay from trial to action in an 81-page ROT case is unreasonable - 3-month confinement reduction despite the lack of prejudice to the accused).

e) *United States v. Stachowski*, 58 M.J. 816 (Army Ct. Crim. App. 2003). Delay of 268 days between sentence and action was not excessive and did not warrant relief for dilatory post-trial processing. Applying a totality of circumstances approach, the court considered the following: that the Convening Authority reduced the appellant's confinement by 30 days because of the post-trial delay; while processing the appellant's case, the installation only had one court reporter; the lone reporter doubled as the military justice division NCOIC; the backlog of cases awaiting transcription was significant; and the cases were transcribed on a "'first in, first out'" basis. *Id.* at 818.

f) *United States v. Bodkins*, 59 M.J. 634 (Army Ct. Crim. App. 2003). Failure to object to dilatory post-trial processing in guilty plea case with a 74-page record of trial (ROT) (i.e., 252 days from sentence to action; 412 days from sentence to receipt of ROT by CCA), in a case with no actual prejudice to the appellant, constitutes waiver. Although prejudice is not a prerequisite to granting relief under Article 66(c), UCMJ, the court will carefully scrutinize claims of dilatory post-trial processing when no timely objection is made especially in light of its 10 published opinions in this area, 32 memorandum opinions, and the continued emphasis on post-trial placed by the JAG School and military conferences.

g) *United States v. Garman*, 59 M.J. 677 (Army Ct. Crim. App. 2003). Allegations of dilatory post-trial processing will be examined on a case-by-case basis applying a totality of the circumstances approach. Court refuses to adopt a bright line rule regarding post-trial delay. Held – appellant was not entitled to relief despite a post-trial delay of 248 days from sentence to action (i.e., 329 days less 81 days attributable to the defense; the military judge's time to authenticate the record was Government time). The factors the court considered were as follows: defense counsel's objection to the post-trial delay was "dilatory," occurring at day 324; after the defense objected, the Government acted on the case expeditiously (i.e., in five days); although unexplained, the delay did not exceed 248 days; slow post-trial processing was the ONLY post-trial error; and the appellant failed to allege any prejudice or harm from the delay. Most significant in the court's decision was the defense counsel's lack of timely objection to the post-trial processing.

4. Reality: Clerk of Court will inquire after 90 days.

5. Post-Action Delay – Forwarding of ROT to Appellate Court for Review.

a) *United States v. Tardif*, 58 M.J. 714 (C.G. Ct. Crim. App. 2003). Confinement reduced from 24 months to 19 months because of the 115-day delay in dispatching the record of trial to the Coast Guard HQ for appellate review.

b) *United States v. Harms*, 56 M.J. 755 (Army Ct. Crim. App. 2002). Appellant was convicted at a SPCM of assaulting a noncommissioned officer and two specifications of communicating a threat. He was sentenced to forfeit $600.00 pay per month for three months, reduction to E-1, confinement for three months and a BCD. Action in the appellant's guilty plea case, a case with a 77 page Record of Trial (ROT), was taken on 4 December 1997. The Clerk of Court did not receive the ROT until 18 August 2000, approximately 988 days after action, nearly three years later. Appellant argued that a 32-month delay in forwarding the ROT was error warranting sentence relief in his case. The Court disagreed. Held - absent actual prejudice, post-action (as opposed to post-trial but pre-action) delay will not result in relief. "At present we decline to extend the remedy fashioned in *Collazo* to such cases. We will continue to evaluate cases such as appellant's for prejudice under Article 59(a), UCMJ." *Id*. at 756. On remand (post-*Tardif*), modified in part. Previous findings affirmed but only so much of the sentence as provides for a BCD affirmed. 58 M.J. 515 (Army Ct. Crim. App. 2003).

XIV. SUSPENSION OF SENTENCE; REMISSION. ARTICLE 71, UCMJ; RCM 1108.

A. The rule requires the conditions of any suspension to be specified in writing, served on the accused, and receipted for by the probationer. *United States v. Myrick*, 24 M.J. 792 (A.C.M.R. 1987) (there must be substantial compliance with R.C.M. 1108). *See*:

1. AR 27-10, para. 5-34;

2. JAGMAN, section 0129; and

3. AF Reg 111-1, para. 15-19.

B. Power of the CA to create conditions.

1. *United States v. Cowan*, 34 M.J. 258 (C.M.A. 1992). The accused asked the CA for a method by which she could serve her confinement and still support her six-year-old child. CA approved the sentence, but suspended for

one year confinement in excess of six months and forfeitures in excess of $724.20, suspension of forfeitures conditioned upon:

a) The initiation of an allotment payable to the daughter's guardian of $278.40, for the benefit of the girl; and

b) The maintenance of the allotment during the time the accused is entitled to receive pay and allowances.

Held – Permissible. *Note*. Court recognizes inherent problems; recommends careful use of such actions.

2. *United States v. Schneider*, 34 M.J. 639 (A.C.M.R. 1992). The accused asked for assistance in supporting his dependents. Court upheld CA's suspension of forfeitures in excess of $400.00 on conditions that the accused:

a) Continue to claim on W-4, as long as he can legitimately do so, single with 2 dependents; and

b) Initiate and maintain allotment to be paid directly to spouse in amount of $2,500.

C. Period of suspension must be reasonable, conditions must not be "open-ended" or "unachievable."

1. Limited by AR 27-10, paragraph 5-34, on a sliding scale from 3 months in a SCM to 2 years or the period of unexecuted portion of confinement, whichever is longer, in a GCM.

2. *United States v. Spriggs*, 40 M.J. 158 (C.M.A. 1994). Uncertain and open-ended period of time required to fulfill one of the conditions (self-financed sex offender program) made the period of suspension of the discharge and reduction in grade "unreasonably long." Court, especially Judge Cox, signals approval for parties' "creative" and "compassionate" efforts.

3. *United States v. Ratliff*, 42 M.J. 797 (N-M. Ct. Crim. App. 1995) (eleven years probation not unreasonably long under the circumstances (though may be barred in the Army by AR 27-10)).

4. Suspension of period of confinement in conjunction with an approved discharge should coincide with serving the unsuspended portion of confinement. *United States v. Koppen*, 39 M.J. 897 (A.C.M.R. 1994).

5. *United States v. Wendlandt*, 39 M.J. 810 (A.C.M.R. 1994). Directing that suspension period begin on date later than action is not per se improper.

XV. VACATION OF SUSPENSION OF SENTENCE. ARTICLE 72, UCMJ; RCM 1109.

A. 1998 Change to R.C.M. 1109.

B. The rule sets forth the procedural and substantive requirements for vacating a suspended sentence. It authorizes immediate confinement pending the vacation proceedings, if under a suspended sentence to confinement. *See* Appendix 18, MCM.

C. *United States v. Connell*, 42 M.J. 462 (1995), *cert. denied*, 516 U.S. 1094, 116 S. Ct. 818, 133d L. Ed. 2d. 762 (1996).

D. *United States v. Miley*, 59 M.J. 300 (2004). Error for the hearing officer (i.e., SPCMCA) in a vacation of suspended punishment situation to refrain from making findings of fact on whether a basis for vacation existed. The hearing officer's decision, pursuant to R.C.M. 1109, must include an evaluation of the contested facts and a determination of whether the facts warrant vacation. A decision based solely on equitable grounds is improper. Error for the GCMCA to vacate the suspended punishment when the hearing officer failed to comply with R.C.M. 1109. Held – vacation action set aside and returned to the GCMCA for yet another (a third vacation hearing) or reinstatement of the terms of the original pretrial agreement. Note – 3-2 decision with J. Baker and C.J. Crawford dissenting.

XVI. WAIVER OR WITHDRAWAL OF APPELLATE REVIEW. ARTICLE 61, UCMJ; RCM 1110.

A. After any GCM, except one in which the approved sentence includes death, and after a special court-martial in which the approved sentence includes a BCD the accused may elect to waive appellate review.

B. Waiver. The accused may sign a waiver of appellate review any time after the sentence is announced. The waiver may be filed only within 10 days after the accused or defense counsel is served with a copy of the action under R.C.M. 1107(h). On written application of the accused, the CA may extend this period for good cause, for not more than 30 days. *See* R.C.M. 1110(f)(1).

C. The accused has the right to *consult* with counsel before submitting a waiver or withdrawal. R.C.M. 1110(b).

1. Waiver.

a) Counsel who represented the accused at the court-martial.

b) Associate counsel.

c) Substitute counsel.

2. Withdrawal.

a) Appellate defense counsel.

b) Associate defense counsel.

c) Detailed counsel if no appellate defense counsel has been assigned.

d) Civilian counsel.

D. Procedure.

1. Must be in writing, attached to ROT, and filed with the CA. Written statement must include: statement that accused and counsel have discussed accused's appellate rights and the effect of waiver or withdrawal on those rights; that accused understands these matters; that the waiver or withdrawal is submitted voluntarily; and signature of accused and counsel. *See* Appendix 19 and 20, MCM.

2. TDS SOP requires a 72 hour "cooling off" period; re-contact after initial request to waive/withdraw.

3. The accused may only file a waiver within 10 days after he or DC is served with a copy of the action (or within period of extension not to exceed 30 days).

4. *United States v. Smith*, 44 M.J. 387 (1996). May not validly waive appellate review, under Article 61, UCMJ, before CA takes initial action in a case, *citing*, *inter alia*, *United States v. Hernandez*, 33 M.J. 145 (C.M.A. 1991) (Art. 61(a) permits such waiver "within 10 days after the action . . . is served on the accused or on defense counsel." R.C.M. 1110(f) must be read in this context. Clearly the R.C.M. cannot supersede a statute, but careful reading of the R.C.M. reveals that it may be signed "at any time after the sentence is announced" but "must be *filed* within 10 days after" service of the action (emphasis added)). *Smith*, 44 M.J. at 391-392.

5. The accused may file a *withdrawal* at any time before appellate review is completed.

6. Once filed in substantial compliance with the rules, the waiver or withdrawal may *not* be revoked.

a) *United States v. Walker*, 34 M.J. 317 (C.M.A. 1992). Documents purporting to withdraw accused's appeal request were invalid attempt to waive appellate review prior to CA's action.

b) *United States v. Smith*, 34 M.J. 247 (C.M.A. 1992). Waiver of appellate representation 58 days before action by CA was tantamount to waiver of appellate review; therefore, was premature and without effect.

c) *Clay v. Woodmansee*, 29 M.J. 663 (A.C.M.R. 1989). Accused's waiver of appellate review was null and void as it was the result of the government's promise of clemency.

XVII. DISPOSITION OF RECORD OF TRIAL AFTER ACTION. RCM 1111.

A. General Courts-Martial. ROT and CA's action will be sent to the Office of The Judge Advocate General (OTJAG).

B. Special Courts-Martial with an approved BCD will be sent to OTJAG.

C. Special Courts-Martial with an approved BCD and waiver of appeal. Record and action will be forwarded to a Judge Advocate for review (R.C.M. 1112).

D. Other special courts-martial and summary courts-martial will be reviewed by a Judge Advocate under R.C.M. 1112.

XVIII. REVIEW BY A JUDGE ADVOCATE. ARTICLE 64, UCMJ; RCM 1112.

A. A Judge Advocate (JA) shall review:

1. Each general court-martial in which the accused has waived or withdrawn appellate review under R.C.M. 1110.

2. Each special court-martial in which the accused has waived or withdrawn appellate review under R.C.M. 1110 or in which the approved sentence does not include a BCD or confinement for one year.

3. Each summary court-martial.

B. A JA shall review, under service regulations, each case not reviewed under Article 66. AR 27-10, para. 5-45*b* says this review may be done either by a JA in the Office of the SJA of the convening command or by a JA otherwise under the technical supervision of the SJA.

C. No review required for: total acquittal, a finding of not guilty only by reason of a lack of mental responsibility, or where the CA disapproved all findings of guilty.

D. Disqualification of reviewer for prior participation in case.

E. The review shall be in writing. It shall contain conclusions as to whether the court-martial has jurisdiction over the accused and the offenses, each specification states an offense, and the sentence is legal. The review must respond to each allegation of error made by the accused under R.C.M. 1105, 1106(f), or filed with the reviewing officer directly. If action on the ROT is required by the CA, a recommendation as to the appropriate action and an opinion as to whether corrective action is required must be included.

F. The ROT shall be sent to the General Court-Martial Convening Authority (GCMCA) over the accused at the time the court-martial was held (or to that officer's successor) for supplementary action if (1) the reviewer recommends corrective action, (2) the sentence approved by the CA includes dismissal, a DD or BCD or confinement in excess of six months, or (3) service regulations require it.

G. If the reviewing JA recommends corrective action but the GCMCA acts to the contrary, the ROT is forwarded to the Judge Advocate General concerned for review under R.C.M. 1201(b)(2). R.C.M. 1112(g)(1).

H. If the approved sentence includes dismissal, the service Secretary concerned must review the case.

XIX. EXECUTION OF SENTENCE. UCMJ, ARTICLE 71, UCMJ; RCM 1113.

A. A sentence must be approved before it is executed (but confinement, forfeitures, and reduction may be carried out before ordered executed).

B. Confinement, unless deferred is immediate. Forfeitures, both automatic and adjudged, and reduction, unless deferred, take effect 14 days after sentence is announced or upon action, whichever is earlier.

C. The CA's initial action may order executed all punishments except a DD, BCD, dismissal or death.

D. A Dishonorable Discharge (DD) or Bad Conduct Discharge (BCD) may be ordered executed only after a final judgment within the meaning of R.C.M. 1209 has been rendered in the case. *If on the date of final judgment a servicemember is not on appellate leave* and more than 6 months have elapsed since approval of the sentence by the CA, before a DD or BCD may be executed, the officer exercising GCM jurisdiction over the servicemember shall consider the advice of that officer's SJA as to whether retention would be in the best interest of the service. Such advice shall include the findings and sentence as finally approved, the nature and character of duty since approval of the sentence by the CA, and a recommendation whether the discharge should be executed.

E. Dismissal of a commissioned officer, cadet or midshipman may be approved and ordered executed only by the Secretary concerned or such Under Secretary or Assistant Secretary as the Secretary concerned may designate.

F. Death. A punishment of death may be ordered executed only by the President.

XX. PROMULGATING ORDERS. ARTICLE 76, UCMJ; RCM 1114.

A. A summary of the charges and specifications is authorized. *See* MCM, Appendix 17. *See also* The Clerk of Court's Handbook for Post-Trial Administration.

B. The specifications and findings in the promulgating order need to sufficiently apprise a third party of the specific offenses that the accused was tried on. Stating "AWOL" without more is defective because it lacks sufficient specificity to prevent against subsequent prosecution for the same offense.

1. *United States v. Glover*, 57 M.J. 696 (N-M. Ct. Crim. App. 2002). Rule for Courts-Martial 1114(c) requires that the charges and specifications either be stated verbatim or summarized. The promulgating order in this case did neither, providing "no useful information about the offenses" the appellant was convicted of except for the number of the UCMJ Article that was violated. *Id.* at 697. Held – the promulgating order failed to comply with Rule for Courts-Martial 1114(c) and absent a verbatim summary of the specification, a "meaningful summary" must be provided. *Id.* at 698. The court provided relief in its decretal paragraph, affirming the findings and sentence and ordering that a supplemental promulgating order be issued in compliance with its decision.

2. *United States v. Suksdorf*, 59 M.J. 544 (C.G. Ct. Crim. App. 2003). Promulgating order that omits suspension of confinement in excess of 150

days and incorrectly reflects the pleas and findings at trial is erroneous. Similarly, an action which fails to reflect a required suspension of confinement is erroneous. Despite these errors, however, the appellant failed to allege any prejudice since he was released from confinement at the appropriate time and did not serve any confinement in excess of the required 150 days. Although Article 66, UCMJ, "does not provide general authority for a court of criminal appeals to suspend a sentence, [the CAAF has recognized a service court's] authority to do so when a convening authority failed to comply with the terms of a pretrial agreement requiring suspension of some part of a sentence." *Id.* at 547. As for the lack of attention to detail in the post-trial processing of the case, the court noted that post-trial processing is "**not rocket science, and careful proof-reading of materials presented to the convening authority, rather than inattention to detail, would save time and effort for all concerned**." In affirming the findings and sentence, the court suspended confinement in excess of 150 days and directed the CA to issue a new promulgating order.

XXI. ACTION BY THE JUDGE ADVOCATE GENERAL. ARTICLES 66 AND 69, UCMJ; RCM 1201.

A. Cases automatically reviewed by a Court of Criminal Appeals (Art. 66).

1. Cases in which the approved sentence includes death.

2. Cases in which the approved sentence includes a punitive discharge or confinement for a year or more.

B. Scope of CCA review: Both law and fact.

1. *United States v. Clifton*, 35 M.J. 79 (C.M.A. 1992). Courts of Military Review need not address in writing all assignments of error, so long as the written opinion notes that judges considered any assignments of error and found them to be without merit.

2. *United States v. Quigley*, 35 M.J. 345 (C.M.A. 1992). Choice of whether to call appellate court's attention to issue rests with counsel, although choice is subject to scrutiny for effective assistance of counsel in each case.

3. *United States v. Gunter*, 34 M.J. 181 (C.M.A. 1992). Error for CMR to deny accused's motion to submit handwritten matter for consideration by that court (detailed summary by appellate defense counsel not sufficient).

C. Power of Courts of Criminal Appeals (CCAs). UCMJ, Art. 66(c):

1. "It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

2. *United States v. Cole*, 31 M.J. 270 (C.M.A. 1990). "Article 66(c)['s] . . . awesome, plenary, *de novo* power of review" grants CCAs the authority to substitute their judgment for that of the MJ. It also allows a "substitution of judgment" for that of the court members.

3. *United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991). A "*carte blanche*" to do justice. J. Sullivan in dissent notes CCAs are still bound by the law.

4. *United States v. Keith*, 36 M.J. 518 (A.C.M.R. 1992). In appropriate case, Army Court may fashion equitable and meaningful remedy regarding sentence.

5. *United States v. Smith*, 39 M.J. 448 (C.M.A. 1994). Plenary, *de novo* power of CCA does not include finding facts regarding allegations of which fact finder has found accused not guilty.

6. *United States v. Lewis*, 38 M.J. 501 (A.C.M.R. 1993). Appellate court has authority to investigate allegations of IAC, including authority to order submission of affidavits and a hearing before a MJ.

7. *United States v. Joyner*, 39 M.J. 965 (A.F.C.M.R. 1994). In reviewing severity of sentence, appellate court's duty is to determine whether accused's approved sentence is correct in law and fact based on individualized consideration of nature and seriousness of offense and character of accused. *United States v. Smith*, 56 M.J. 653 (Army Ct. Crim. App. 2001) (holding that nine year sentence for escape from Disciplinary Barracks and related offenses not inappropriately severe even though co-accused and individual who initiated the scheme to escape only received three years). *See also, United States v. Hundley*, 56 M.J. 858 (N-M. Ct. Crim. App. 2002); *United States v. Ransom*, 56 M.J. 861 (Army Ct. Crim. App. 2002).

8. *United States v. Ragard*, 56 M.J. 852 (Army Ct. Crim. App. 2002). Clemency power is not within the powers granted to appellate courts by Article 66, UCMJ. Appellant argued that his medical condition (having AIDS) made his dismissal an inappropriately severe sentence because his dismissal would limit his access to medical care. The Army Court disagreed, noting that sentence appropriateness involves a judicial function of ensuring that the

accused gets the punishment deserved while clemency involves "bestowing mercy."

9. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). Appellate court may reassess a sentence if it is convinced that the sentence would have been of at least a certain magnitude, even if there is no error. If there is an error, such a reassessment must purge the prejudicial impact of the error. If the error was of constitutional magnitude, the court must be persuaded beyond a reasonable doubt that its reassessment has rendered any error harmless. If the appellate court cannot be certain that the prejudicial impact can be eliminated by reassessment and that the sentence would have been of a certain magnitude, it must order a rehearing on sentence. *See also United States v. Harris*, 53 M.J. 86 (2000) (noting that appellate courts must also make the same determination if a sentence has been reassessed by a convening authority).

a) *United States v. Doss*, 57 M.J. 182 (2002). Appellant convicted of assault consummated by a battery, assault with a dangerous weapon, and soliciting another to murder his wife. At trial, the DC presented no evidence on appellant's mental condition other than his unsworn statement. On appeal, the Navy-Marine Court found appellant's defense counsel ineffective during the sentencing portion of the trial by failing to present evidence of appellant's mental condition. The court reassessed the appellant's sentence and reduced the period of confinement from eight to seven years. On appeal, the CAAF found that the DC's omissions could not be cured (i.e., rendered harmless beyond a reasonable doubt) by reassessing the sentence because it was impossible to determine what evidence a competent defense counsel would have presented. The court, therefore, held that the lower court abused its discretion in reassessing the sentence instead of ordering a rehearing.

b) *United States v. Mitchell*, 58 M.J. 446 (2003). Appellant convicted of, among other offenses, five drug distribution specifications and sentenced to a BCD, ten years confinement, total forfeitures, and reduction to E-1. On appeal, the Army Court set aside two distribution specifications and ordered a rehearing on sentence. On rehearing, the appellant was sentenced to a DD, six years confinement, and reduction to E-1. The Army Court affirmed the sentence finding that under an objective standard, a reasonable person would not view the rehearing sentence as "in excess of or more severe than" the original sentence; therefore, Art. 63, UCMJ, and R.C.M. 810(d)(1) were not violated. The CAAF reversed as to sentence, finding that a DD is more severe than a BCD and no objective equivalence is available when comparing a punitive discharge with confinement. The CAAF affirmed only so much of the sentence as provided for a BCD, six years confinement, and reduction to E-1.

10. *United States v. Commander*, 39 M.J. 973 (A.F.C.M.R. 1994). Appellate courts may examine disparate sentences when there is direct correlation between each accused and their respective offenses, sentences are highly disparate, and there are no good and cogent reasons for differences in punishment. *See also United States v. Kelly*, 40 M.J. 558 (N.M.C.M.R. 1994).

11. *United States v. Pinegree*, 39 M.J. 884 (A.C.M.R. 1994) (inappropriately severe sentenced reassessed, dismissal disapproved). *See also*, *United States v. Hudson*, 39 M.J. 958 (N.M.C.M.R. 1994) (court disapproved BCD); *United States v. Triplett*, 56 M.J. 875 (Army Ct. Crim. App. 2002) (court reduced accused period of confinement from fifteen years to ten years based on the five and six year sentences two co-accuseds received).

12. *United States v. Van Tassel*, 38 M.J. 91 (C.M.A. 1993). Standard of review of post-trial evidence of insanity is whether reviewing court is convinced beyond a reasonable doubt that factfinders would have no reasonable doubt that accused did not suffer from severe mental disease or defect so that accused lacked substantial capacity either to appreciate criminality of conduct or conform conduct to requirements of law, if offenses occurred before effective date of statute making lack of mental responsibility affirmative defense to be proven by defense.

13. *United States v. Dykes*, 38 M.J. 270 (C.M.A. 1993). Standard for ordering post-trial hearing on issue presented to appellate court.

a) Not required where no reasonable person could view opposing affidavits, in light of record of trial, and find the facts alleged by accused to support claim.

b) Required where substantial unresolved questions concerning accused's claim.

14. *United States v. Fagan*, 58 M.J. 534 (Army Ct. Crim. App. 2003), *rev'd*, 59 M.J. 238 (2004). The lower court was correct in holding that *United States v. Ginn*, 47 M.J. 236 (1997)[1] provides the proper analytical framework for

[1] In *United States v. Ginn*, the CAAF established six principles for dealing with allegations of error raised for the first time on appeal in a post-trial affidavit:

> First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in the appellant's favor, the claim may be rejected on that basis. Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.
>
> Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers and affidavit that expressly agrees

dealing with a post-trial affidavit raising a claim of cruel and unusual punishment. The court, however, erred in holding that it could grant relief at its level "in lieu of ordering a *DuBay* hearing (U*nited States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967)), to resolve the disputed factual issues raised by the appellant's affidavit. "The linchpin of the *Ginn* framework is the recognition that a Court of Criminal Appeals' factfinding authority under Article 66(c) does not extend to deciding disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties." 59 M.J. 238, 242 (2004). Finally, the lower court erred in finding a conflict, "where none exists", between *Ginn* and *United States v. Wheelus*, 49 M.J. 283 (1998). 59 M.J. at 243. "The exercise of the 'broad power' referred to in *Wheelus* flowed from the existence of an acknowledged legal error or deficiency in the post-trial review process. It is not a 'broad power to moot claims of prejudice' in the absence of acknowledged legal error or deficiency, nor is it a mechanism to 'moot claims' as an alternative to ascertaining whether a legal error or deficiency exists in the first place." 59 M.J. at 244.

15. *United States v. Campbell*, 57 M.J. 134 (2002). Standard for handling post-trial discovery issues:

> a) Has appellant met his threshold burden of demonstrating that some measure of appellate inquiry is warranted? If no – stop. If yes, then –
>
> b) What method of review should be used (e.g., affidavits, interrogatories, fact-finding hearing, etc.)?

16. *United States v. Hutchison*, 57 M.J. 231 (2002). Sentence review limited to determining appropriateness of sentence. Consideration of whether civilian

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with those facts, the Court can proceed to decide the legal issues on the basis of those uncontroverted facts.

Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.

Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

Sixth, the Court of Criminal Appeals *is required to order a factfinding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a DuBay proceeding.*

Fagan, 58 M.J. at 537 (emphasis in original).

criminal prosecution was "appropriate" is an improper consideration for the CCA.

17. *United States v. Perron*, 58 M.J. 78 (2003). Appellate courts (i.e., CCAs) can not impose alternative relief on an unwilling appellant to rectify a mutual misunderstanding of a material term of a PTA. Appellant must consent to the proposed relief or be afforded the opportunity to withdraw from the prior plea.

18. *United States v. Holt*, 58 M.J. 227 (2003). The lower court (AFCCA) erred, depriving the appellant of a proper Article 66(c) review limited to the record of trial, when it considered PEs 16 (victim's letter) and 17-19, 21, 24, 26, 29-32, and 34 (copies of cancelled checks, debt collection documents, and a pawn ticket) for the truth of the matters asserted, "alter[ing] the evidentiary quality of the [exhibits]" when the military judge ruled otherwise and instructed the members that they were not to consider the cited evidence for the truth of the matters asserted. *Id.* at 233. "Article 66(c) limits the Courts of Criminal Appeals "to a review of the facts, testimony, and evidence presented at trial, and precludes a Court of Criminal Appeals from considering 'extra-record' matters when making determinations of guilt, innocence, and sentence appropriateness (citation omitted). Similarly, the Courts of Criminal Appeals are precluded from considering evidence excluded at trial in performing their appellate review function under Article 66(c)." *Id.* at 232.

19. *United States v. Osuna*, 58 M.J. 879 (C.G. Ct. Crim. App. 2003). Appellate courts are limited, absent clearly erroneous findings or legal error, to the factual determinations made by prior panels of that court. In appellant's first appeal, the court affirmed the findings but remanded for a new review and action because there was no evidence that the Convening Authority considered the appellant's clemency submissions or that he was ever advised to consider the defense's written submissions. C.J. Baum, in the first appeal, dissented re: findings on several offenses citing to a lack of factual sufficiency. On appeal the second time, the appellant renewed his challenge to the findings. The court, in an opinion authored by C.J. Baum, held "it would be inappropriate for us to readdress our previous factual determination, absent a legal error necessitating such action." *Id.* at 880.

20. *United States v. Castillo*, 59 M.J. 600 (N-M. Ct. Crim. App. 2003). The appellant was convicted of unauthorized absence terminated by apprehension and sentenced to reduction to E-1, 51 days confinement, and a BCD. On appeal [*Castillo I*], the appellant alleged that her sentence was inappropriately severe, an allegation that the court agreed with, setting aside the Convening Authority's (CA's) action and remanding with the following direction:

> The record will be returned to the Judge Advocate General for remand to the [CA], who may upon further consideration approve

an adjudged sentence no greater than one including a discharge *suspended* under proper conditions.

Id. at 601 (*quoting United States v. Castillo*, NMCM No. 200101326, 2002 WL 1791911 (31 Jul 2001) (slip op. at 10) (unpub.)). Upon remand, the CA's Staff Judge Advocate (SJA), LtCol B prepared an SJAR that erroneously advised the CA that the appellate court "recommended" that the punitive discharge be set aside. The defense counsel disagreed with the SJAR noting that the guidance from the NMCCA was not a recommendation, rather, it was a directive. The CA, following the SJA's advice, again approved a punitive discharge. Held – the CA's decision to disregard the court's guidance was "a clear and obvious error," a decision based on advice that was similarly "clearly erroneous" and "misguided." *Id.* Finally, the court advised that "[p]arties practicing before trial and appellate courts have only three options when faced with [their] rulings [:comply with the decision, request reconsideration, or appeal to the next higher authority to include certification of an issue by the Judge Advocate General]." *Id.* In exercising its sentence appropriateness authority under Article 66(c), UCMJ, the court approved only so much of the sentence as provided for reduction to E-1 and 51 days confinement, disapproving the BCD.

21. Extraordinary Writs and Government Appeals.

D. Cases reviewed by TJAG (Art. 69(a)).

1. Those GCMs when the approved sentence does not include a dismissal, DD, or BCD, or confinement for a year or more (Art. 69(a)).

2. Those cases where a JA finds, under R.C.M. 1112, that as a matter of law corrective action should be taken and the GCMCA does not take action that is at least as favorable to the accused as that recommended by the JA (R.C.M. 1112(g)(l)).

3. Cases which have been finally reviewed, but not reviewed by a CCA or TJAG (per R.C.M. 1201(b)(1)), may *sua sponte* or upon application of the accused under Art. 69(b) be reviewed on the grounds of:

a) Newly discovered evidence.

b) Fraud on the court.

c) Lack of jurisdiction.

d) Error prejudicial to the substantial rights of the accused.

e) Appropriateness of the sentence.

4. TJAG may consider if the sentence is appropriate and modify or set aside the findings or sentence.

5. TJAG has the power to authorize a rehearing.

E. United States Army Legal Services Agency (USALSA).

1. Army Court of Criminal Appeals (Article 66, UCMJ).

2. Defense Appellate Division (Article 70, UCMJ).

3. Government Appellate Division (Article 70, UCMJ).

4. Examination and New Trials Division (Article 69, UCMJ).

XXII. REVIEW BY THE COURT OF APPEALS FOR THE ARMED FORCES. ARTICLES 67 & 142, UCMJ; RCM 1204.

A. Authorized five judges since 1 October 1990.

B. Expanded role of Senior Judges.

C. Service of Article III Judges.

D. Cases reviewed.

1. All cases in which the sentence as approved by a Court of Criminal Appeals extends to death.

2. All cases reviewed by a Court of Criminal Appeals which TJAG orders sent to CAAF for review.

3. All cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, CAAF has granted a review.

4. Extraordinary writ authority.

E. *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993). Equal protection and due process challenge to TJAG's authority to certify issues under Art. 67.

F. *United States v. Jones*, 39 M.J. 315 (C.M.A. 1994). Power of CAAF usually does not include making sentence-appropriateness determinations. Province of the Courts of Criminal Appeals.

G. Abatement *Ab Initio*. *United States v. Rorie*, 58 M.J. 399 (2003). Appeal to the CAAF (before it CMA) UP of Article 67(a)(3), UCMJ, is a matter of discretion and NOT a matter of right. As such, the CAAF will no longer grant abatement *ab initio* upon death of an appellant pending Article 67(a)(3) appellate review, reversing a policy followed by the court since1953. Abatement *ab initio* is a "matter of policy in Federal courts," not mandated by the Constitution or statute, and is not part of the Rules of Practice and Procedures for the CAAF. By reversing its prior 50-year policy, the court is now in line with the rule established by the Supreme Court in *Dove v. United States*, 423 U.S. 325 (1976). To the extent that *United States v. Kuskie*, 11 M.J. 253 (C.M.A. 1981) and *Berry v. The Judges of the United States Army Court of Military Review*, 37 M.J. 158 (C.M.A. 1983) are inconsistent with this decision, they were overruled.

XXIII. REVIEW BY THE SUPREME COURT. ARTICLE 67a, UCMJ; RCM 1205.

A. Decisions of the Court of Appeals for Armed Forces may be reviewed by the Supreme Court by writ of certiorari.

B. The Supreme Court may not review by writ of certiorari any action of CAAF in refusing to grant a petition for review.

XXIV. POWERS AND RESPONSIBILITIES OF THE SECRETARY. RCM 1206.

Sentences that extend to dismissal of a commissioned officer, cadet, or midshipman may not be executed until approved by the Secretary concerned or his designee.

XXV. SENTENCES REQUIRING APPROVAL BY THE PRESIDENT. RCM 1207.

That part of a court-martial sentence extending to death may not be executed until approved by the President.

XXVI. FINALITY OF COURTS-MARTIAL. RCM 1209.

A. When is a conviction final?

1. When review is completed by a Court of Criminal Appeals and —

a) The accused does not file a timely petition for review by CAAF and the case is not otherwise under review by that court; or

b) A petition for review is denied or otherwise rejected by CAAF; or

c) Review is completed in accordance with the judgment of CAAF and:

(1) A petition for a writ of certiorari is not filed within applicable time limits;

(2) A petition for a writ of certiorari is denied or otherwise rejected by the Supreme Court; or

(3) Review is otherwise completed in accordance with the judgment of the Supreme Court.

2. In cases not reviewed by a Court of Criminal Appeals.

a) When the findings and sentence have been found legally sufficient by a JA, and when action by such officer is required, have been approved by the GCMCA, or

b) The findings and sentence have been affirmed by TJAG when review by TJAG is required under R.C.M. 1112(g)(1) or 1201(b)(1).

B. *Berry v. Judges of U.S. Army C.M.R.*, 37 M.J. 158 (C.M.A. 1993). Conviction not final until expiration of Art. 71(c) filing period. Abatement of proceedings appropriate when accused died before end of period.

C. *United States v. Jackson*, 38 M.J. 744 (A.C.M.R. 1993). Abatement after death of appellant, before appeal to Court of Military Appeals. *See also*, *United States v. Huey*, 2002 CCA LEXIS 186 (Army Ct. Crim. App. 2002) (findings and sentence set aside based on accused's death prior to final action). *But see United States v. Rorie*, 58 M.J. 399 (2003) (CAAF will no longer grant abatement *ab initio* upon death of an appellant pending Article 67(a)(3) appellate review, reversing a policy followed by the court since1953).

D. Finality and execution of sentences.

1. A DD or BCD may be ordered executed only after a final judgment within the meaning of R.C.M. 1209.

2. Dismissal may be approved and ordered executed only by the Secretary concerned.

3. Only President may order execution of death penalty.

XXVII. PETITION FOR A NEW TRIAL. ARTICLE 73, UCMJ; RCM 1210

A. Within 2 years of initial action by the CA.

B. Requirements:

1. Evidence discovered after trial or fraud on the court.

2. Evidence not such that it would have been discovered by petitioner at time of trial in exercise of due diligence.

3. Newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

C. Approval authority: OTJAG, CCA or CAAF.

D. Concern for avoiding *manifest injustice* is adequately addressed in three requirements in R.C.M. 1210(f)(2). *United States v. Williams*, 37 M.J. 352 (C.M.A. 1993).

E. *United States v. Hanson*, 39 M.J 610 (A.C.M.R. 1994). Petition for new trial based on newly discovered evidence.

F. *United States v. Niles*, 39 M.J. 878 (A.C.M.R. 1994). Petition for new trial not favored and, absent manifest injustice, will not normally be granted. *See also United States v. Humpherys*, 57 M.J. 83 (2002).

XXVIII. ASSERTIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. *United States v. Lewis*, 42 M.J. 1 (1995). Counsel's refusal to submit handwritten letter as part of post-trial matters was error. Counsel may advise client on contents of post-trial matters but final decision is the client's. The CAAF rejects the Army Court of Criminal Appeals' procedures for handling IAC allegations, originally set out in *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989), *review denied*, 32 M.J. 249 (C.M.A. 1990). Trial defense counsel should not be ordered to

explain their actions until a court reviews the record and finds sufficient evidence to overcome the presumption of competence.

B. *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989). Two key points:

1. When the accused specifies error in his request for appellate representation or in some other form, appellate defense counsel will, at a minimum, invite the attention of the CCA to those issues and it will, at a minimum, acknowledge that it has considered those issues and its disposition of them.

2. Guidelines for resolving IAC allegations:

a) Appellate counsel must ascertain with as much specificity as possible grounds for IAC claim.

b) Appellate defense counsel then will allow the appellant the opportunity to make his assertions in the form of an affidavit (explaining the affidavit is not a requirement, but also pointing out that it will "add credence" to his allegations).

c) Appellate defense counsel advises the accused that the allegations relieve the DC of the duty of confidentiality with respect to the allegations.

d) Appellate Government counsel will contact the DC and secure affidavit in response to the IAC allegations.

C. *United States v. Dresen*, 40 M.J. 462 (C.M.A. 1994). Counsel's request, in clemency petition, for punitive discharge was contrary to wishes of accused and constituted inadequate post-trial representation. Returned for new PTR and action.

D. *United States v. Pierce*, 40 M.J. 149 (C.M.A. 1994). Factual dispute as to whether DC waived accused's right to submit matters to the CA. Held – where DC continues to represent accused post-trial, there must be some showing of prejudice before granting relief based on premature CA action. Any error in failure to secure accused's approval of waiver not prejudicial in this case.

E. *United States v. Aflague*, 40 M.J. 501 (A.C.M.R. 1994). Where there is no logical reason for counsel's failure to submit matters on behalf of an accused and where the record glaringly calls for the submission of such matters, the presumption of counsel effectiveness has been overcome and appellate court should do something to cleanse the record of this apparent error.

F. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). DC submitted no post-trial clemency/response documents. Accused did not meet burden of showing that counsel did not exercise due diligence.

G. *United States v. Carmack*, 37 M.J. 766 (A.C.M.R. 1993). Defense counsel neglected to contact accused (confined at USDB) regarding post-trial submissions. Court admonished all defense counsel to live up to post-trial responsibilities; also, admonished SJAs and CAs to "clean up the battlefield" as much as possible.

H. *United States v. Sander*, 37 M.J. 628 (A.C.M.R. 1993). Court unwilling to adopt *per se* rule that DCs must submit post-trial matters in all cases.

I. *United States v. Jackson*, 37 M.J. 1045 (N.M.C.M.R. 1993). Since clemency is sole prerogative of CA, where defense counsel is seriously deficient in post-trial representation, court reluctant to substitute its judgment for that of CA.

J. *United States v. Gilley*, 56 M.J.113 (2001) (IAC in submitting three post-trial documents which were not approved or reviewed by appellant and which seriously undermined any hope of getting clemency; court also find IAC in counsel's trial performance).

K. *United States v. Key*, 57 M.J. 246 (2002) (w/out holding, the CAAF hints that counsel may be ineffective if they fail to advise the client on his post-trial right to request waiver of forfeitures for the benefit of his dependents).

L. *United States v. Starling*, 58 M.J. 620 (N-M. Ct. Crim. App. 2003). The appellant was not denied post-trial effective assistance of counsel by his counsel's failure to submit clemency matters. The court went on to establish a prospective standard for handling IAC allegations resulting from a failure to submit evidence on sentencing or during post-trial:

> [A]bsent a clear indication of inaction by the defense counsel when action was compelled by the situation, future claims of inadequate representation for failure to exercise sentencing rights or post-trial rights will not be seriously entertained without the submission of an affidavit by the appellant stating how counsel's inaction contrasted with his wishes. If the claim involves the failure to submit matters for consideration, the content of the matters that would have been submitted must be detailed.

Id. at 623.

M. *United States v. Mazer*, 58 M.J. 691 (N-M. Ct. Crim. App. 2003). Defense counsel was not ineffective by failing to request deferment of forfeitures when the defense's submission highlighted, for the Convening Authority, the appellant's poor

financial situation. More importantly, the appellant did not allege that he directed his counsel to seek deferment and counsel thereafter ignored his request. Assuming *arguendo* that failure to seek deferment prior to action was deficient performance by counsel, the appellant failed to establish any prejudice stemming from the deficient performance.

N. *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34 (2003). Article 66, UCMJ, and Due Process entitle appellants to timely post-trial and appellate review. In so holding, the court noted the following: "the standards for representation of servicemembers by military or civilian counsel in military appellate proceedings are identical" and the "duty of diligent representation owed by detailed military counsel to servicemembers is no less than the duty of public defenders to indigent civilians." *Id.* at 38-39. Finally, the differences between the military justice system as compared to the civilian system, to include the [military] appellate courts' unique fact finding authority, compel even "greater diligence and timeliness than is found in the civilian system." *Id.* at 39. *See also United States v. Brunson*, 59 M.J. 41 (2003) (counsel have a duty to aggressively represent their clients before military trial and appellate courts, late filings and flagrant or repeated disregard for court rules subject the violator to sanctions). *Id.* at 43.

XXIX. RELEASE FOR CONFINEMENT *PENDENTE LITE*.

A. *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990). Moore successfully appealed his rape convictions before NMCMR and sought release from confinement pending the government's appeal to C.M.A. Held –

1. Under the All Writs Act, 28 U.S.C. 1651, C.M.R. and C.M.A. have authority to order deferment of confinement pending completion of appellate review.

2. If the accused has won a "favorable decision from the Court of Military Review," and "the situation is one in which the Government could establish a basis for pretrial confinement (*see* R.C.M. 305), then it should have the opportunity to show why the accused should be kept in confinement pending the completion of appellate review. This can best be handled by ordering a hearing before a military judge or special master [for a determination similar to that for pretrial confinement]."

XXX. CONCLUSION.

Typical General/Special Court-Martial Post-Trial Processing